CASES AT LAW

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH.

DECEMBER TERM, 1864.

ROBERT H. SMITH v. JOHN N. PRIOR.

(2 Winst., 19.)

1. A man who has been enrolled becomes thereby a soldier in the army of the Confederate States, and his appointment afterwards to an office under the State Government does not entitle him to exemption.

2. The Governor's certificate has no effect in such a case, for the person is not an officer, his appointment being void.

CERTIORARI at the suit of Lieut. John N. Prior, enrolling officer of the Eighth Congressional District, directed to *Chief Justice Pearson,* for the purpose of reviewing a judgment given by him in a writ of *habeas corpus* sued by Robert H. Smith against John N. Prior.

Besides the facts stated in the opinion of the Court, it appeared by the return of the Chief Justice that in February, 1864, a writ of *habeas corpus* was issued at the suit of Robert H. Smith against Lieutenant Prior, returnable before the Chief Justice, and that on the trial of it by him he adjudged that Smith was unlawfully held in custody, and he ordered that Smith should be discharged; and at the same time this discharge was made subject to the decision of the Supreme Court in the case of *Walton,* and the appointment of Smith to be watchman of the town of Salisbury was made after the decision of the Supreme Court in *Walton's case, ante,* 325.

Boyden for petitioner. (418)
Bragg for Lieutenant Prior.

MANLY, J. The facts of this case are that after the acts of 5 January, declaring persons who had furnished substitutes no longer exempt, the petitioner was enrolled and ordered into camp.

But as there was then pending a case in this Court in which the constitutionality of the act of 5 January was to be tested, it was agreed that further proceedings in the petitioner's case might be suspended until the decision of the Court was known. In the meantime the petitioner was released on furlough. Afterwards, and while on furlough, petitioner received the appointment of watchman for the town of Salisbury. Having been again brought into camp, after the decision in *Gatlin v. Walton, ante,* 325, he sued out this writ, which was heard and decided at chambers, and is brought here by *certiorari,* at the instance of the General Government.

Upon this state of facts, we are of opinion the petitioner is not entitled to exemption by reason of his appointment as watchman of the town of Salisbury. His enrollment, prior to such appointment, put him in military service, and he could not be elected out of it into a city watch. It is not necessary that one should be in the field, as we conceive, to constitute him a soldier. If he has been enrolled by legal authority, and put on furlough, his status is as firmly fixed as if he were in the trenches, confronting the enemy.

We have had occasion to explain more fully the rights of the respective governments of the State and the Confederate States, in matters of this sort, in the case of *Upchurch v. Scott, post,* 520, to which reference may be had.

(419) We can conceive of no greater reason why the State should have the power to take away from the Confederate States persons appointed to places of duty than the reverse of the proposition. Neither, in our opinion, is necessary, and neither is constitutional. Still less can it be supposed that a soldier can be taken out of the army by the State and appointed to office, especially when we consider the paramount powers and duties of the General Government in respect to war. The exemption certified does not seem to be material, according to the view we take of the case. Exemptions are granted by the act of Congress to specified officers of the State Government, and to such other *officers* as the Governor shall certify to be necessary. But Smith is not an officer, and therefore not in the class which the Governor's certificate could avail. Being a soldier of the Confederate States, as we think he was, by the acts of enrollment and furlough, he could not divest himself of the character, except by the will of these States.

There is error, therefore, in the judgment at chambers, discharging the petitioner, and he is hereby declared subject to perform military

service to the Confederate States, and is therefore recommitted to the officer, John N. Prior, or to such other officer as may be in charge of the matter.

NOTE.—See *Sowers' case, ante*, 384; *Bridgman v. Mallett, post*, 500, overruling *Russell case, ante*, 388.

(420)

T. S. WOOD v. JOHN A. BRADSHAW.

(2 Winst., 22.)

1. A bonded exempt is in the service of the Confederate States by force of a constitutional act of Congress, 17 February, 1864, section 10, 4th clause, 1st, 2d, and 3d paragraphs.

2. And, therefore, he is not liable to service in the Home Guards, under State laws.

MANLY, J., dissenting.

CERTIORARI, at the suit of Thomas S. Wood, to review the judgment of *Heath, J.*, in a writ of *hebeas corpus* sued out by him for the purpose of being released from the custody of the defendant, an officer of the Home Guard. *Judge Heath* ordered the petitioner to be remanded into the custody of the officer.

All the facts are stated in the opinions of the judges.

Boyden for petitioner.
No counsel for Bradshaw.

BATTLE, J. The question in this case is, whether the petitioner, who is what is commonly called a bonded exempt under paragraphs 1, 2, and 3 of clause 4 of section 10 of the act of Congress, passed in February, 1864, can be made to perform military service in the Home Guards, by force of the acts of our Legislature creating that organization. The solution of this question depends upon the preliminary inquiries, first, whether the petitioner was, by virtue of the act of Congress, in the service of and performing duty for the Confederate Government at the time when he was arrested by the defendant for service in the Home Guard; and, secondly, whether Congress had power under the Constitution, to conscribe the petitioner for any other than services of a military kind.

Upon the first inquiry, I think there cannot be a reasonable doubt. A critical examination of the 2d and 3d paragraphs of the clause and section of the acts of Congress to which I have referred will show that the personal attention of the bonded exempt is required in the management of the farm, to enable him to furnish the Gov- (421)

ernment with the amount of provisions required of him. It is inadmissible to suppose that the Government was indifferent as to the source from which his quota of supplies was to be obtained. The Government expected him to produce the grain and meat on his own farm, and not to purchase them from another person. The exigencies of the country imperatively demanded that every man should produce what he could, and the spirit of the act of Congress in granting exemptions to the owners of fifteen able-bodied hands, and authorizing details in favor of the owners of a less number, evinces a clear design to stimulate production to the greatest extent. It is manifest that this policy would be thwarted if a large slave owner, after securing his exemption, should be allowed to become indifferent whether he raised provisions on his own farm or purchased them elsewhere. The requirement of a personal supervision of his farm is further shown by the proviso contained in the 6th paragraph of the clause and section of the act referred to, which declares, "That all the exemptions granted under this act shall only continue whilst the persons exempted are actually engaged in their respective pursuits or occupations." This proviso is evidently not confined to the particular exemption spoken of in the same paragraph, for it uses the term "act" instead of paragraph or clause, and the words, "their respective pursuits or occupations," are clearly inapplicable, if contractors to carry the mail were the only persons meant. These words necessarily embrace all the classes of exempts mentioned in the whole "act."

A reference to the exemption act of October, 1862, in favor of slave owners, and the general dissatisfaction which it caused throughout the country, will prove still more fully that Congress intended, by the act of 1864, to place the bonded exempts from military duty into the service of the Confederate Government, as producers.

(422) The act of October, 1862, exempted from military service in the army the owner of twenty slaves, without regard to the age, sex, or condition, "to secure the proper police of the country." But, notwithstanding the cause assigned for it, the fact of this exemption of slave owners produced, as is well known, a popular clamor against the measure, which was so great that Congress was compelled to yield to it; which it did by repealing the act and passing the act of February, 1864. The latter act omits the odious feature in the former, and while providing for the indispensable necessity of keeping up a surveillance over slaves when owned in large numbers, made it acceptable to the country by demanding a vigorous service from the owners as producers for the Government.

The second inquiry is, whether Congress had power under the Constitution to conscribe the petitioner for any other than services of a military kind. That it had, I think, there cannot be a doubt. Congress

has conferred upon it by the Constitution of the Confederate States the power to declare war, and to raise and support armies. Art. 1, sec. 8, pars. 11 and 12. These powers are conferred in unlimited terms, except that no appropriation of money to that use shall be for a longer time than two years. Armies, when raised, must be supported, and the power to support must be unlimited as the power to raise them. If the Government have the money, or the ability to procure it, Congress may, and usually does, approprate that to the purpose of purchasing the necessary supplies; but if there be no money in the treasury, and the Government have no means of procuring a sufficient amount of it, I cannot perceive any reason why these persons, who would otherwise be in the field as soldiers, may not be compelled to furnish, according to their respective abilities, such provisions and munitions of war as the (423) army may need. This commutation of service is similar to the escuage which, in process of time, was allowed in the feudal law in exchange for the military services which the tenants in chivalry originally owed the lord of whom they held their lands. 2 Bl. Com., 74. But even supposing that this commutation of service cannot be *compelled* by Congress, there can be no objection to its being *allowed* to those who may prefer the service of raising provisions to that of performing military duty in the field or garrison.

From the foregoing considerations, I am clearly of opinion that the petitioner was rightfully in the service of the Confederate Government. This, as it seems to me, must settle the question as to his liability to be seized and carried off as a member of the Home Guard.

The supremacy of the war power of the Confederate over that of the State Government cannot be disputed.

The personal service which the Confederate Government has a right to demand, and has demanded, of the petitioner is inconsistent with that which the State demands of him; and, such being the case, the latter must give way to the former. In this respect the bonded exempts differ from all those classes of exempts from whom the Confederate Government makes no demand of other kinds of service as a condition of exemption from military service. All of the latter kind of exempts the State may, at its discretion, pass into the service in the militia or Home Guard organization. The Confederate Government cannot exempt from the service of the State any person who is not called into its own service; but every one who is doing service for it must, of necessity, be protected from being forced into an inconsistent service for the State.

I concur, therefore, in opinion with *Judge Heath*, that the petitioner ought to be discharged; but as he, in deference to some prior adjudications of two of his brethren on the bench of the Superior (424)

Court, made an order *pro forma* to remand the petitioner, I think that order should be reversed, with costs, and an order of discharge entered.

PEARSON, C. J. Has Congress power to conscript citizens to *serve as agriculturists*, and thereby take from the State the right to require them to perform "Home Guard" duty?

The only doubt I have had is as to the first branch of the question, *i. e.*, can the Confederate States, while one part of our citizens are put in the field to fight with muskets, put another part in the field to work with plows?

My brothers *Battle* and *Manly* are clear in the opinion that this may be done under the war power, to raise and *support* armies; and, indeed, it seems to fall within the principles of the decision in *Gatlin v. Walton, ante*, 325, that, in case of necessity, the power of the Confedeate States is unlimited so far as the citizens are concerned. It is my duty to conform to that decision.

Upon the other branch of the question I have no difficulty. It is decided in *Johnson v. Mallett, ante*, 410, that the war power of the Confederate States, so far as the States are concerned, is *limited* by their rights in regard to civil officers; and the question is narrowed to this, Is there also a limitation on the war power of the Confederate States in regard to the rights of the States under their war power? I think not, for the reason that the States have, by the provisions of the Constitution, subordinated the State war power to that of the Confederate States. "No State shall engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." "Congress shall have power to call forth the militia, etc."—the whole if necessary. So the war power of a State is secondary, and imposes no limitation on that of the Confederate States. It follows that, although the State may have, as in this instance, put citizens in the Home Guard, such action of the
(425) State is subject to the future action of the Confederate States, and the latter may *rightfully* take men out of the "Home Guard" of a State in order to put them in the service of the Confederate States, under their paramount war power.

These "agricultuists" are as fully in the service of the Confederate States, under the war power, as if they were fighting in the army. They are, in the first place, conscripted for the army, then exempted *for the purpose* of putting them in the service as agriculturists. This was done in order to give them an election to serve with a musket or with a plow. But that does not affect the question; nor is it, in my judgment, at all varied by the circumstance that those having fifteen slaves are exempted *directly* by the act, and others are exempted or detailed by the President

in his discretion, under the authority of the act; for the point is, they are all put in the service of the Confederate States as agriculturists, under the war power, and a State has no right to interfere with, or impair, the exercise of *its* war power.

Whether men are to work themselves in order to raise provisions for the army, or are to "manage and oversee" fifteen slaves, so as to make them work for that purpose, it is clear that in either case their efficiency as agriculturists for the Government will be impaired if they are required to do duty in the Home Guard.

I concur with *Judge Battle* in the opinion that the petitioner is entitled to a judgment of discharge.

MANLY, J., dissenting: Having a decided conviction to the contrary, I cannot concur in the opinion of a majority of the Court.

The question is, whether an exempt, who owns fifteen hands, and has given bond as required by the act of Congress of 17 February, 1864, 4th sess., ch. 5, sec. 10, par. 4, is bound to perform military service in the Home Guard, organized under the act of our Legislature of (426) July, 1863.

That part of the act of Congress relating to the matter is found in the fourth division of section 10, and consists of two paragraphs, as follows:

"IV. There shall be exempt one person, as overseer, or agriculturist, on each farm or plantation upon which there are now, and were upon 1 January last, fifteen able-bodied field hands between the ages of 16 and 50, upon the following conditions:

"1. This exemption shall only be granted in cases in which there is no white male adult on the farm or plantation not liable to military service, nor unless the person claiming the exemption was, on 1 January, 1864, either the owner and manager or overseer of said plantation; but in no case shall more than one person be exempted for one farm or plantation.

"2. Such person shall first execute a bond, payable to the Confederate States of America, in such form, and with such security, and in such penalty, as the Secretary of War may prescribe, conditioned that he will deliver to the.....at some railroad depot, or such other place or places as may be designated by the Secretary of War, within twelve months then next ensuing, 100 pounds of bacon or, at the election of the Government, its equivalent in pork, and 100 pounds of net beef (said beef to be delivered on foot) for each able-bodied slave on the farm or plantation within the above said ages, whether said slaves be worked in the field or not; which said bacon or pork and beef shall be paid for by the Government at the prices fixed by the commissioners of the State

under the impressment act: *Provided,* that when the person thus exempted shall produce satisfactory evidence that it has been impossible for him, by the exercise of proper diligence, to furnish the amount of meat thus contracted for, and leave an adequate supply for the
(427) subsistence of those living on the said farm or plantation, the Secretary of War shall direct a commutation of the same to the extent of two-thirds thereof, in grain or other provisions, to be delivered by such person as aforesaid, at equivalent rates.

"3. Such person shall bind himself to sell the marketable surplus of provisions and grain now on hand, and which he may raise from year to year while his exemption continues, to the Government, or to the families of soldiers, at prices fixed by the commissioners of the State under the impressment act: *Provided,* that any person exempted as aforesaid shall be entitled to a credit of 25 per cent on any amount of meat which he may deliver within three months from the passage of this act: *Provided further,* that persons coming within the provisions of this act shall not be deprived thereof by reason of having been enrolled since 1 February, 1864.

"In addition to the foregoing exemptions, the Secretary of War, under the direction of the President, may exempt or detail such other persons as he may be satisfied ought to be exempted on account of public necessity, and to insure the production of grain and provisions for the army and the families of soldiers. He may also grant exemptions or details, on such terms as he may prescribe, to such overseers, farmers, or planters as he may be satisfied will be more useful to the country in the pursuits of agriculture than in the military service: *Provided,* that such exemptions shall cease whenever the farmer, planter, or overseer shall fail diligently to employ, in good faith, his own skill, capital, and labor exclusively in the production of grain and provisions, to be sold to the Government and the families of soldiers at prices not exceeding those fixed at the time, for like articles, by the commissioners of the State under the impressment act."

It is plain to see that the proviso in the second paragraph has no reference to the exempts in the first, and therefore has no bearing on the question before us. Each seems to be independent of the other.
(428) The first authorizes a class of exemptions upon conditions, and with provisos. The second adds to this class others upon other conditions, and with one other proviso—the one in question.

The conditions and proviso in each pertain only to the exemptions or details therein authorized, and have nothing to do with the exemptions and details in any other.

The language of the last proviso, in its grammatical structure, is further confirmatory of this idea: "*Provided,* that such exemptions shall

cease," etc. The qualifying adjective *such* limits the meaning of the word exemptions to some particular class. What class? Of course, the last mentioned, those in the paragraph to which the proviso is appended.

Another part of the act which has been referred to as bearing upon our inquiry is that found in paragraph VI of the same section. It is in these words:

"VI. That nothing herein contained shall be construed as repealing the act approved 14 April, 1863, entitled An act to exempt contractors for carrying the mails of the Confederate States, and the drivers of post coaches and hacks, from military service: *Provided,* that the exemptions granted under this act shall only continue while the persons exempted are actually engaged in their respective pursuits or occupations."

Here, again, is an independent provision for exemptions, with its appropriate proviso. They belong to each other, and have no reference to anything going before or after. It will be perceived that this part of the section declares the act, theretofore exempting mail contractors and the drivers of mail post coaches and hacks, shall be continued in force: *"Provided,* that the exemptions granted under this act shall only continue," etc. Under what act? The answer is obvious—under the act of 14 April, 1863.

This construction is strengthened, and rendered certain in my (429) mind, by an examination of the whole structure of the act under consideration, by the apparent independence and completeness of most of its parts, by the consideration that this same provision is introduced in another part of the act, with respect to another class of exempts, and by the further consideration that the language of the proviso is inapplicable to some of the exemptions therein granted.

Having cleared away these extraneous and irrelevant matters, the construction of the act in the particular matter now before us will follow without difficulty. The sole connection of the exempt who works fifteen able-bodied hands, and who gives bond as required, with the Government, is through a contract, executory in its nature, which gives the Government no right of control over his person, but simply a right to demand the meat stipulated for, and to call for a sale to itself or to the families of soldiers, of all surplus marketable produce, at the valuation assessed by commissioners. A failure to perform these obligations will subject the obligor to an action on the bond, and damages. But I look in vain, whether in the bond or in the act, for any obligations of personal service to the Confederate States inconsistent with his duty of service to North Carolina.

I recognize, in the fullest sense, the war power of the Confederate States. There is no limit to the demand which that Government may make for men, save necessary officers of the State Government; but until

such demand is made, and the citizen put into service, he is subject to be employed in any way which the State may think proper.

If it were conceded that the proviso in paragraph VI of section 10 had reference to all the exemptions in the act of which it is a part, it would by no means follow, in my judgment, that it would amount to a conscription for agricultural labor. Personal service with the (430) hands is not necessarily implied. The pursuit or occupation may be carried on vicariously, and, provided it be prosecuted with the hands continuously, there would be no forfeiture of the exemption. He might well perform a tour of duty in the Home Guard and still remain an exempt from Confederate military service.

He is not, according to this construction of the act, either a civil officer or a soldier on detail. He is bound by no tie of personal service other than that of every citizen, and by consequence may be employed by the State in either her civil or military department.

There is a manifest distinction between the exempts in the first paragraph of the act which I have quoted and the detailed men authorized in the second. The first are loosed from their obligations as conscripts, and cannot be recalled, except by a new law; the second are retained, merely detailed for other duties than military, being *liable,* all the while, to a revocation of their details.

My conclusion is that the petitioner owes no personal service to the Confederate States which is inconsistent with service of the State in any post, civil or military, and that he may consequently be compelled to serve in the Home Guard.

In my opinion the judgment below is correct.

PER CURIAM. Reversed.

MURDOCH WHITE v. PETER MALLETT.

(2 Winst., 34.)

1. Application for exemption, on account of being the owner and manager or overseer of fifteen able-bodied slaves, must be made in reasonable time after 1 January, 1864.

2. Application on 22 November, 1864, is not in reasonable time.

(431) THIS was a writ of *certiorari* at the suit of Major Mallett, for the purpose of reviewing the judgment of *Gilliam, J.,* in a writ of *habeas corpus* sued out by Murdoch White.

The writ of *habeas corpus* was applied for and issued on 22 November, 1864.

It appeared on the trial that the petitioner was the owner and manager of more than fifteen able-bodied slaves, and that he had all the other qualifications required by the act of Congress of 17 February, 1864.

It also appeared that on 20 April, 1864, the petitioner had applied for a detail as a farmer working ten hands, and that his application had not been acted on by the Department of War when he was ordered to camp in November.

Judge Gilliam discharged the petitioner on the authority of *Savage's case,* decided by *Chief Justice Pearson.*

Fowle for petitioner.
Bragg for Mallett.

PEARSON, C. J. Assuming that the plaintiff was, in the *first instance,* entitled to exemption as the owner or manager of fifteen hands, we are of opinion that he is too late in now making an application on that ground.

One of the conditions of the exemption is that the party "shall sell the surplus of provisions and grain *now on hand,* and which he may raise from year to year, to the Government," etc.

We think the application must be made in reasonable time, so that the Government may have the benefit of this condition in respect to the provisions and grain on hand. This application was not made until November, 1864, nine months after the passage of the act, which is not in reasonable time; for during that period the surplus of provisions and grain on hand in February, 1864, may have been sold, exchanged, or otherwise disposed of, and thus the Government would lose the benefit of a condition which has been made impossible by the act (432) of the plaintiff.

Whether an allegation that the plaintiff had on hand at the time he made the application now relied on the same surplus of provisions and grain which he had in February, 1864, would have met this objection, is a question not presented. It would seem, owing to the nature of the subject, that the Government should not be subjected to the inconvenience of going into such collateral matters by the folly or misfortune of the plaintiff in not putting his claim to exemption, in the first instance, on the ground he now takes. In a few words, the exemption is made to depend on a condition precedent, that the Government shall have his surplus provisions and grain at certain rates. Its performance is made impossible by the delay of the plaintiff, which is his misfortune.

The case of *Savage,* on which his Honor puts his opinion, was de-

cided without reference to the point on which this decision is put. It is a new suggestion on the construction of the act of Congress, but, we think, well founded.

There is error. Judgment reversed, and judgment that the petitioner be remanded.

EDWIN HASWELL v. PETER MALLETT.

(2 Winst., 36.)

1. One enrolled in March, 1864, under the act of 17 February of that year, who was under 45 years of age at the time of enrollment, is bound to serve in the regular army during the war.

2. A written paper, signed by the enrolling officer, in its terms an exemption, is but a furlough or detail if the officer had no right to grant an exemption.

(433) HABEAS CORPUS, sued out by Haswell, for the purpose of being released from service in the regular army as a conscript.

The facts appear from the opinion of the Court.

Moore and Rogers for petitioner.
Bragg for Mallett.

MANLY, J. This case turns upon the principles considered in *Goodson v. Caldwell, post,* 519. But the facts of the case being different, we are conducted to a different conclusion.

The petitioner was 45 years of age in May last. He had been exempted anterior to the passage of the law of 17 February, as a miller. After the passage of that act, viz., in the month of March, he was enrolled, and another exemption paper given, which, after the act of February repealing exemptions in such cases, could only operate as a furlough or detail. He was afterwards, viz., on 10 June, ordered into camp. He applied for a detail. This was refused. He was ordered into camp, and sued out this writ.

The enrollment and detail, which took place in March, about two months before he reached the age of 45, fixed his status as a soldier. He was properly enrolled in the body of regular troops, where the term of service for the war is prescribed by the acts of 1862.

The petitioner must be remanded to custody, and the costs be taxed against him.

See *Kesler v. Brawley, ante,* 402.

(434)

JAMES CASEY v. L. S. ROBARDS.

(2 Winst., 38.)

1. Free negroes are compellable to render the services required of them by the act of Congress of 17 February, 1864.

2. Congress has the power to assign conscripts to any branch of the service.

3. If a free negro sells his services for a valuable consideration, by deed, for ninety-nine years, he does not thereby cease to be a free man.

APPEAL from *Reade, J.*, at Fall Term, 1864, of HAYWOOD.

James Casey, a free negro, presented his petition to *Reade, J.*, on 17 September, 1864, setting forth that he was a free negro, and that in 1859, for a valuable consideration, he conveyed by deed his services for ninety-nine years to James R. Love, and that the contract has never been rescinded, and then continued in full force; that on 10 September, 1864, he was taken by Lieut. L. S. Robards, the enrolling officer of that district, into his custody as a conscript free negro, and was then detained as such. The prayer was for a writ of *habeas corpus*. The writ issued, returnable before *Judge Reade* "at the courthouse in Waynesville, Haywood County, on 3 October next," which day was during the term of Haywood Superior Court. Lieutenant Robards' return admitted the facts stated in the petition, and claimed the petitioner as a free negro conscript. The petition, writ, and return were filed in the court, and at the term of the Superior Court of law for Haywood County, held on the first Monday after the fourth Monday of September, 1864, the case was tried by *Judge Reade*, and judgment rendered against the petitioner, from which he appealed to the Supreme Court.

The following is the case made by the judge: "The petitioner applied for and obtained a writ of *habeas corpus*, returnable before me in open court at Waynesville on the first Monday after the fourth (435) Monday of September, 1864. The petitioner, who is a free negro, was arrested by the respondent, Lieutenant Robards, on the ground that he was liable, under the act of Congress, to be enrolled for employment as a free negro in the military service of the Confederate States, as contemplated by that act. It is conceded by the petitioner that he is between the ages named in the act; and it is admitted by the respondent that some four or five years ago the petitioner conveyed his services for a valuable consideration, by deed, to James R. Love, for ninety-nine years, and that said contract still remains in full force. J. R. Love is dead, and his executors claim the services of the petitioner."

Bragg for Lieutenant Robards.
W. H. Bailey for petitioner.

MANLY, J. Upon the argument with which we have been favored in this case the matter was made to turn upon two points:

1. Whether the status of petitioner, as a free negro, continued, notwithstanding the deed entered into with James R. Love.

2. Whether, as a free man, he could be conscribed for such services as are indicated in the act of Congress of 17 February, 1864 (1 Cong. 4th sess., ch. 79, sec. 1).

The part of the act pertinent to our inquiry is in the following words: "That all male free negroes, and other persons of color, resident in the Confederate States, between the ages of 18 and 50 years, shall be held liable to perform such duties with the army, or in connection with the military defenses of the country, in the way of work upon fortifications, or in Government works for the production or preparation of material of war, or in military hospitals, as the Secretary of War may (436) from time to time prescribe; and while engaged in the performance of such duties shall receive rations and clothing, and compensation at the rate of $11 a month, under such rules and regulations as the said Secretary may establish."

It is admitted that the Government does not proceed against the petitioner as one bound to serve as a slave, and who may, therefore, under the act of Congress, be *impressed;* but it claims him as a free negro, subject to be conscribed, and to do duty under the section of the act which has just been quoted.

The petitioner contends that the effect of the deed to Love is to degrade him from the condition of a free man and, by consequence, to withdraw him from liability to conscription for military service.

In *Phillips v. Murphy,* 49 N. C., 45, it was decided that a deed made by a free negro, of his services for a term of years, did not operate to make a slave of him, or to pass a property in him, but simply to give the grantee a right to his services upon an executory agreement, for a breach whereof an action of covenant would lie. So, in the case before us, the deed for service for a term of years does not alter the social or political condition of the negro. No other or different legal consequences result from his agreement than if it had been entered into by a white man. Both, upon a breach of it, are subject to be sued for damages. Neither is subject to have enforced against him a specific execution.

Besides the direct authority I have quoted, it may be observed that the petitioner can only maintain his suit upon the assumption that he is a free man. There is no middle ground upon which he can stand. He is either a slave or a free man. If the latter, he is of the class intended to be embraced by the first section of the act of 17 February, 1864; if the former, he cannot sue, but his suit must be dismissed and he remitted to

custody. If he says, I am a free man, he abandons this point; if he says he is a slave, his declaration puts him out of court.

2. The question in the second place seems to be based upon the (437) idea that all men must be put into the army upon a footing of equal rights, and be permitted to choose the arm of service to which they will respectively attach themselves. This, we think, is a palpable mistake. The organization of an army consists in dividing it into parts, and assigning these parts to different modes of service. This is essential to give it efficiency, and to distinguish it from a fighting mob.

Without descending to minute divisions, there is found in every army a body of infantry, who are on foot and armed with the musket and rifle; a body of cavalry, who are on horseback and armed with saber and pistol; a body of artillery, who are in charge of the cannon, and a body of engineers, who are not armed at all, but with spade and shovel and pickaxes are in charge of fortifications, sapping and mining, and the like. Here are varieties of service, of unequal eligibility; and yet the public authorities, without question of right, assign men to these departments as they deem them best fitted for one or another, whether they will or no. If this can be done by executive and ministerial officers of the law, surely it can be done by the law tself. If regulations made by the War Department, as incidental to its power to organize an army, can justify an arbitrary assignment, the organic law itself can prescribe such regulations.

So it is entirely competent, according to regulations and the unquestioned usages in the army for officers to detail or assign men for the performance of work on the fortifications, in the workshops, producing the material of war, and in the hospitals for taking care of the sick and wounded; and it seems plain, if this thing can be done as an incidental power, of which there has never been any question, the detail may be preordained by the law authorizing the force to be raised.

We can perceive no reason why the law, in authorizing the levy (438) of troops from time to time, may not provide that any portion of these (the latest conscripts, for instance) shall be employed in the least responsible positions; that is, on the fortifications, in the shops and hospitals, and as wagon and ambulance drivers.

By an examination of the act (19 February, 1864, ch. 79) it will be seen that what is here indicated is all that has been attempted by Congress. For the purpose of giving greater efficiency to the army, by preventing the withdrawal of men from the field, the act authorizes the conscription of free negroes for the purpose of performing duty "with the army, and in connection with the military defenses of the country," in working on fortifications, in workshops, hospitals, etc. If these

duties could be assigned the free negroes after they got into the army (of which there seems to be no question), *a fortiori,* could they be assigned to these duties by the law conscribing them.

We have been willing to put the case of the petitioner upon the most favorable ground, and to consider it as the case of a white man, entitled to all the rights and privileges of the race; and with respect to him in that point of view, the law is constitutional and proper to be enforced.

When we consider the difference, before the law, between the social and political conditions of the races, how it has been its uniform policy to keep them separate socially, the law appears to be now eminently proper. Its special features seem to be in conformity only to the unbroken system of our legislation, and to be necessary to preserve homogeneity in our social fabric.

When it became necessary, therefore, as it is declared to be in the preamble to this and other acts of the Congress, passed at the
(439) same session, to conscribe or impress negroes for military duty, it was a requirement of social order that they should be brought in in such way as not to violate the distinction of race. It would not have been proper, and according to usage, to mix them with the whites in such way as to compel social equality.

The idea of equal rights, upon which the petitioner's case seems to be based, is not practicable in the government of an army.

Troops, to give them efficiency, must be moved by one head. The unexperienced and excitable may be kept in the rear, while veterans may be selected, at the will of the commander, to occupy the posts of danger. Regiments, proved to be untrustworthy in the hour of trial, may be removed from the post of honor, and their places supplied with others who have been found more reliable. Individuals whose dispositions or whose loyalty may be suspected may be removed from opportunity and temptation, by being detailed for service in the rear, as cooks, teamsters, nurses, and the like. It has never been imagined that the different divisions of the army could be permitted to contend or by any means determine for themselves their respective positions and duties in the same.

There can be but little room in an army for the enjoyment of civil rights. Its government is necessarily absolute, and, in most respects, according to the will of a single mind, the great and paramount duty being to give it force and rapidity of action, and to guard it against dangers, internal and external.

Our conclusion, then, is:

1. That the first section of the act of Congress, 17 February, 1864, ch. 79, is simply a conscription of free negroes for certain duties pertaining to military service.

2. That it is within the scope of authority belonging to the War (440) Department, incidental to the war power, to place men, and of course free negroes, in the army, in any position where they may be deemed most safe from improper influences, and for which they may be deemed best fitted.

3. If the War Office can do this as an incident to the power to organize the army, *a fortiori,* may it be done by Congress, which, of right, declares the war, and authorizes the raising of the army. In the latter, the power must be the more complete and perfect.

4. That it was not only the right of the Congress to dispose of the negro conscripts as the act prescribes, but there was also a fitness and propriety in such disposition, arising out of the condition of society amongst us, and all previous legislation in respect to the negro race.

Judgment of this Court, in accordance with the judgment of the court below, that the petitioner be remanded to the custody of the officer, and that he pay the costs of this proceeding, to be taxed by the clerk.

THE STATE v. DICK.

(2 Winst., 45.)

1. Any remark made by a judge, on the trial of an issue by a jury, from which the jury may infer what his opinion is as to the sufficiency or insufficiency of the evidence, or any part of it pertinent to the issue, is *error;* and the error is not corrected by his telling the jury that it is their exclusive province to determine on the sufficiency or insufficiency of evidence, and that they are not bound by his opinion in regard thereto.

2. It is *error* to leave to the jury the decision of a fact on which the admissibility of evidence depends. But, if the party excepting could not possibly be injured by it, it is not ground for a *venire de novo.*

APPEAL from *Heath, J.,* at Fall Term, 1864, of IREDELL. (441)

The prisoner, a slave, was indicted for arson, in burning a barn with grain in it. The State offered evidence tending to prove the guilt of the prisoner as charged in the indictment: among other things, his confessions, which one Kerr testified were freely and voluntarily made. In the course of the trial one Edson testified that the confessions were made after Kerr had represented to the prisoner that it would be for his advantage to confess his guilt, and the prisoner's counsel moved the court to withdraw the confessions from the consideration of the jury, which the court refused to do, and adjudged that they were freely made,

as testified to by Kerr; and then remarked to the solicitor, that after the other evidence already given in the cause, he, the solicitor, might withdraw this, if he chose so to do. The solicitor declined doing so.

The judge charged the jury that there was evidence tending to show the prisoner's guilt, besides his confessions; and as to them, he instructed the jury that if they believed Kerr, they were to be received, and such credit given to them, in whole or in part, as they might think proper; but if they believed Edson, they should discard *all* the evidence about the confessions, and try the prisoner on the other evidence. He further told them, "that they were the judges of the facts, as he was of the law, and nothing was to be inferred as to the prisoner's guilt because of any remark made by him; they were as independent of him, as to the facts, as he was of them as to the law; that it was his right and duty to say whether there was evidence tending to show that the prisoner was guilty, and theirs to pass upon it, and weigh it, and say whether it was strong enough to convict him."

The jury found the prisoner guilty, and from the judgment according to the verdict the prisoner appealed.

Attorney-General for the State.
No counsel for prisoner.

(442) MANLY, J. In looking into the record in this case, two errors appear to have been committed on the trial, for one of which, at any rate, the prisoner is entitled to a *venire de novo*.

On the trial a question arose as to the withdrawal of certain confessions of the prisoner. The court declined withdrawing them, but remarked to the solicitor for the State, that, after the other evidence already given in the cause, he, the solicitor, might withdraw them, if he chose to do so, which the solicitor declined. This seems to us to be an expression of opinion on the part of the judge that the case was sufficiently proved without the aid of the confessions. This is not directly asserted, but is a matter of inference plainly from the manner in which the expedient of withdrawing the testimony is suggested: "After the other evidence, already given in the cause, the solicitor might withdraw," etc. The sense which we attribute to this language is that which his Honor himself seems to have ascribed to it; for he takes pains to explain to the jury that they were not bound by any opinion or judgment of his as to the facts. He endeavored to obviate the effect of his opinion by announcing, in distinct terms, the jury's independency of him in all matters of fact pertaining to the issue; but this it was not practicable for him to do. The opinion had been expressed, and was incapable of being recalled.

The statute declares that "no judge, in delivering a charge to the petit jury, shall give an opinion whether a fact is fully or sufficiently proved, such matters being the true office and province of a jury."

The object is not to inform the jury of their province, but to guard them against any invasion of it.

The division of our courts of record into two departments—the one for the judging of the law, the other for judging of the facts—is a matter lying on the surface of our judicature, and is known to everybody. It was not information on this subject the Legislature intended (443) to furnish; but their purpose was to lay down an inflexible rule of practice—that the judge of the law should not undertake to decide the facts. If he cannot do so directly, he cannot indirectly; if not explicitly, he cannot by innuendo. What we take to be the inadvertence of the judge, therefore, was not cured of its illicit character by the information which he immediately conveyed. Knowledge on the part of the jury of their proper province is not the criterion for determining the propriety or impropriety of an opinion from the judge as to the sufficiency of the proofs. It is the same whether the jury know their rights or not.

The provision of the law in question has been in existence since 1796. On the various occasions when the law has been digested and reënacted, it has been continued in the same words; and the interpretation which we now give it is that which has been given it from the beginning. The judge cannot properly express an opinion whether a fact pertinent to the issue is sufficiently or insufficiently proved. Many questions of fact, especially inquiries into mental capacity, and frauds, require as much experience, science, and acumen as the abstruser questions of law; and yet their decision is left by law in the hands of the comparatively inexperienced and unlearned. This, we suppose, has been to maintain undisturbed and inviolate that popular arbiter of rights, the trial by jury, which was, without some such provision, constantly in danger from the will of the judge acting upon men mostly passive in their natures, and disposed to shift off responsibility; and in danger, also, from the ever-active principle that power is always stealing from the many to the few. We impute no intentional wrong to the judge who tried this case below. The error is one of those casualties which may happen to the most circumspect in the progress of a trial on the circuit. When once committed, however, it was irrevocable, and the pris- (444) oner was entitled to have his case tried by another jury.

The second error appearing upon the record is the instruction given to the jury in relation to the confessions of the prisoner.

The question made before the court was whether the confessions had not been made under such influences as to render them inadmissible.

The two witnesses who had been examined before the judge upon that point were Kerr and Edson. The court instructed the jury that, as they had heard the evidence of these persons, if they believed Kerr had stated the truth of the transaction in regard to the confession, then they were all to be received, and such credit given to them as they might think proper; but if they thought that Edson's statement was the true one, and the inducement was held out before the prisoner made any confession of his own guilt (if any such was made), then they should disregard all the evidence of confessions, etc. The error here consists in laying the confessions before the jury in this alternative way. In the first exception just considered, the judge went over into the field of labor belonging to the jury. In this he invites the jury to come over into his. Neither is lawful. Such a trespass, without leave, on the part of juries, though a grave error, is irremediable in the class of cases now before us. If invited, it becomes an error in the judge. He cannot put upon others the decision of a matter, whether of law or fact, which he himself is bound to make. The parties are entitled to his judgment, as a finality, on all questions of fact arising on the trial of a cause upon which depends the admissibility of testimony. It is the duty of the judge to determine them definitely, and to admit or reject the testimony accordingly. It is error to leave it to the jury to decide the preliminary question of admissibility, and to instruct them to consider it, or not
(445) to consider it, as they find the question the one way or the other.

This matter was considered in *Ratliff v. Huntley,* 27 N. C., 545, and *Monroe v. Stutts,* 31 N. C., 49, and the law declared to be as herein stated. For this error, the prisoner would be entitled to have his case put before another jury, if it would, by any possibility, have brought him harm; but it does not appear to us that it could, the judge having previously decided against the prisoner; and it is not therefore considered of any avail to the prisoner in his bill of exceptions. It is noticed in order to renew our disapprobation of the course.

For the first error, the prisoner is entitled to a

Venire de novo.

Cited: S. v. Andrews, 61 N. C., 206; *S. v. Caveness,* 78 N. C., 490; *S. v. Alston,* 113 N. C., 668; *Williams v. Lumber Co.,* 118 N. C., 935, 939; *S. v. Howard,* 129 N. C., 673; *Avery v. Stewart,* 134 N. C., 292; *Withers v. Lane,* 144 N. C., 190; *S. v. Swink,* 151 N. C., 728; *S. v. Cook,* 162 N. C., 588; *S. v. Harris,* 166 N. C., 247; *Speed v. Perry,* 167 N. C., 128; *Medlin v. Board of Education,* Ib. 244; *Bank v. McArthur,* 168 N. C., 52; *S. v. Beal,* 170 N. C., 768.

THE STATE v. RICHARD HONEYCUTT.

(2 Winst., 51.)

Buying of and receiving from a slave corn or other forbidden article on the slave's own account, the owner of the slave being present and knowing what is done, and giving no *written* permission, the buyer and the slave being unaware of his presence, is indictable under section 85, ch. 34, Rev. Code.

INDICTMENT against the defendant for buying of and receiving from a slave belonging to F. B. Moore, a certain quantity of corn, against the act of the General Assembly (Rev. Code, ch. 34, sec. 85), tried before *Heath, J.*, at IREDELL Fall Term, 1864.

On the part of the State there was evidence tending to show that the slave, in the night-time, carried a bag of corn near to the defendant's house and threw two stones on the roof of the house, and the defendant came out of the house on the second stone being thrown, and received the corn. The master of the slave and the witness for the State, suspecting that the slave was carrying the corn to the defendant for the purpose of selling it to him, followed the slave, and was near him when the corn was sold and delivered, and saw the sale and delivery. When the corn was delivered to the defendant, he handed something to the slave, but the witness did not know what. The defendant did not know of the master's presence.

The defense was that as the master was present at the sale and delivery, they were his acts, and not those of the slave.

The judge charged the jury that if the sale and delivery, one or both, were made by the slave as described by the witness, and the defendant did not know at the time that the master was present, the presence of the master made no difference, and the defendant was guilty; and from the judgment accordingly, he appealed.

Attorney-General for the State.
No counsel for defendant. (447)

MANLY, J. The principle assumed by the counsel in the court below, that the master may sell and deliver corn by the hands of his slave, he (the master) being present and directing it, is too plain to admit of contradiction; but this is not the case presented upon the record.

The master was, indeed, within view of the transaction between his slave and the defendant; but there is no evidence that either defendant or the slave knew of his being there; much less is there any evidence that the master authorized the act. All the case states, bearing upon this

point, is that the master followed the slave because he *suspected* that he was going to trade with the defendant, and was in view of the trading when it occurred.

The delivery of the corn was made in the night-time, by the slave, upon a private interview procured by unusual signals, and may be presumed, under the circumstances, to have been on the slave's own account, unless the contrary appear. Such a delivery, without a written permission, is against the criminal law, although the owner or manager was cognizant of it and consenting to it. This is decided in *S. v. Hart,* 26 N. C., 246, and is now approved.

Without impugning, therefore, the position that a slave may lawfully, without a written license, deliver corn in his master's name and on his master's account, provided his master constitutes him his agent for such purpose, and it so appears on the proofs; yet it is clear that all other trading with or acceptance from a slave of corn or other forbidden article, without permission in writing, is unlawful.

The point, then, presented is whether a delivery of corn by a slave, on his own (the slave's) account, the owner being present and observing the transaction, but giving no permission in writing, is a viola-
(448) tion of the criminal law. The judge below instructed the jury it was, and in this we concur.

PER CURIAM. No error.

THE STATE v. PETER BROWN.

(2 Winst., 45.)

1. It is not a ground for arresting judgment that the two offenses of permitting a slave to go at large as a free person, and of permitting him to keep house as a free person, are joined in the same count of an indictment. Such objection ought to be taken upon a motion to quash the indictment, and not upon a motion in arrest of judgment.

2. If a slave, living in a house to himself, keeps a boarding-house for his own livelihood, and the master, knowing it, exercises no control over him or his business, this is an offense within chapter 107, sec. 29, of the Revised Code.

INDICTMENT against the defendant for permitting his slave to go at large, as a free person, and for permitting him to keep house as a free person, exercising his own discretion in the employment of his time. Both offenses were charged in one count. The trial was before *Heath, J.*, at MECKLENBURG Fall Term, 1864.

It was in evidence that the defendant was the owner of the slave, who is 65 or 70 years old; that she lived on a lot in the town of Charlotte, 200 yards from where the defendant lived, who was frequently on the lot where she lived, he having a tanyard on the lot, and being engaged in working at that business; that she kept a boarding-house for soldiers and other white persons, and was frequently seen in the market and in the stores, buying supplies for her household; that when the defendant was remonstrated with, by a policeman of the town, for permitting her to go at large and live in this manner, he said that she was old and unable to work, and was of little value to him while he had (449) her, and that he permitted her to work her own way.

The judge charged the jury that if they believed, from the evidence, that the defendant knowingly permitted the slave to go at large as a free person, exercising her own discretion in the employment of her time, or if he knowingly permitted her to keep house to herself as a free person, exercising her own discretion in the employment of her time, he was guilty; but if the slave lived or kept house in the house mentioned, for the purpose of attending to the business of her master, he was not guilty.

The jury found the defendant guilty, and from the judgment on the verdict the defendant appealed.

Attorney-General for the State.
No counsel for defendant.

BATTLE, J. We are unable to discover any error committed by the judge in the trial of the case in the court below. The facts stated by the witnesses, if believed, certainly brought the case within the prohibition of the act under which he is indicted.

The testimony was fairly submitted to the jury in the charge of the court, and with the result the defendant must be content. *S. v. Duckworth, ante,* 240.

There is no ground upon which the motion to arrest the judgment can be sustained. The offenses of the owner of a slave, permitting him or her to go at large as a free person, and to keep house as a free person, are of a cognate character, and there can be no more objection to their being included in the same count of an indictment than there is for joining in the same count the charge of an affray and that of (450) a mutual assault and battery.

At all events, the objection ought to have been taken upon a motion to quash the indictment, and cannot be made available upon a motion in arrest of judgment. See Arch. Cr. Pl., 53; *S. v. Allen,* 11 N. C., 356.

PER CURIAM. No error.

Cited: S. v. Tytus, 98 N. C., 707; *S. v. Christmas,* 101 N. C., 755.

THE STATE v. ELLICK.

(2 Winst., 56.)

1. It is error for the judge to make a general charge, without declaring and explaining the law arising on the evidence.
2. If A. is about to strike B., who is unwilling to enter into a fight, and shows it by words or actions, and A. presses on and strikes, or attempts to strike, and thereupon B. kills with a deadly weapon, it is *manslaughter.*
3. If, on a sudden quarrel, the parties begin a fight by consent, without deadly weapons, and, after blows pass, one uses a deadly weapon and kills, it is *manslaughter.*
4. If, on a sudden quarrel, the parties fight by consent, at the instant, with deadly weapons, and one is killed, it is but *manslaughter:* provided the parties fight on equal terms and no undue advantage is taken.
5. Where words passed between the prisoner and the deceased, who were sitting on the doorsill, and the prisoner got up, the deceased then got up and reached his hand inside the door and got a stick which was a deadly weapon, and, as he was turning around with the stick, the prisoner stabbed him with a bowie-knife: *Held* to be *murder.*
6. If on a trial of an indictment for murder the judge instructs the jury that if they believe the witnesses on either side the prisoner is guilty, it is equivalent to a charge that the prisoner is guilty, upon his own evidence alone, taken in the most favorable view for him; and there is no error if his evidence did not, in such view, tend to prove his innocence or to mitigate his offense to a lower grade.
7. When it is proved that one has killed intentionally, with a deadly weapon, the burden of showing justification, excuse, or mitigation is on him, and the jury must be satisfied, by the testimony, that the matter offered in mitigation is true. The doctrine of reasonable doubt does not apply.

(451) INDICTMENT against Ellick, a slave, for the murder of another slave, Cornelius, tried before *French, J.,* at Fall Term, 1864, of GRANVILLE.

Micajah, a slave, a witness on the part of the State, swore that one night in the last summer he had a quarrel with the prisoner, about the prisoner having been attacked by a dog a week before. He and the prisoner fought; he threw the prisoner down, and seeing the prisoner feeling for his knife, he left him; shortly afterwards he saw the prisoner seated on the doorsill with the deceased; he heard some words pass between the two, but did not hear what they were. He saw the prisoner get up, and immediately afterwards the deceased arose, and as he rose, prisoner made a thrust at him with both hands, and witness saw the blow stricken on the left side of deceased, who immediately after receiving the blow reached his hand inside the door and took a stick and knocked prisoner down. The deceased died of the wound. The stick

which the deceased used was admitted by the State to be a deadly weapon. Other witnesses for the State swore to the same general effect as Micajah.

Witnesses were examined on the part of the prisoner who testified to the facts stated in the opinion of the Court.

The counsel for the prisoner requested the court to charge the jury that if they had a rational doubt, from the evidence, whether the killing was done with malice, that the prisoner was entitled to the benefit of that doubt, and they should find the prisoner guilty of manslaughter only. The court refused to give the instruction. The counsel for the prisoner further requested the court to charge the jury that if the fatal blow was given by the prisoner after he was stricken with the stick by the deceased, that it was manslaughter only. The court (452) declined to give the instructions, because there was no evidence to sustain it. The court instructed the jury that upon the evidence of the witnesses on the part of the State, or of the prisoner, the killing was murder.

The counsel for the prisoner excepted to the charge of the judge.

The jury found the prisoner guilty, and from judgment accordingly the prisoner appealed.

Attorney-General for the State.
Eaton for the prisoner.

PEARSON, C. J. We concur with Mr. Eaton in the position that from the manner in which the case was put to the jury, the motion for a *venire de novo* is to be considered on the testimony of the witnesses for the prisoner only; and that the testimony of his principal witness, Harriet, is to be taken in the view most favorable to him. This follows from the fact that the judge made a general charge, and did not "declare and explain the law arising on the evidence." *S. v. Summey, post,* 496; *Gaither v. Ferebee, ante,* 303; *S. v. Norton, ante,* 296.

We have these facts: The prisoner and one Micajah, on a starlight night and in the shade of trees, had a fight. Micajah got the prisoner down, and then ran off. The prisoner rose up, and had his hand to his side as if he was holding something in his hand; he then (458) sat down on the doorsill on which the deceased was sitting. Words passed between them; the prisoner got up; the deceased then rose up and reached his hand inside the door and got a stick. As he was turning round (after getting the stick), the prisoner stabbed him in the left side with a bowie-knife, the blade of which was 9 inches long. The deceased then knocked him down with the stick; as he rose, he knocked him down

a second and a third time; prisoner ran off, the deceased followed him a few steps, and fell, and died of the wound. The bowie-knife and stick were admitted to be deadly weapons.

The learned counsel insisted that the offense was manslaughter, on two grounds: (1) The act of seizing the stick, with an intent instantly to strike, was an assault with a deadly weapon, and amounted to legal provocation. (2) The prisoner had reasonable ground to believe that the deceased was about to do him great bodily harm, and struck to prevent it, which mitigates the offense to manslaughter.

Conceding these principles of law, the Court is of opinion that neither applies to this case, and that the offense is murder. There is some *confusion* in respect to the application of these principles of the law of homicide, growing out of *obiter dicta* and certain decisions to be met with in the books. It is important that all confusion should be cleared away, especially in times like these; for one of the ill effects of war is to scatter deadly weapons among the people, familiarize the public mind to scenes of blood, and make a resort to such weapons a thing of frequent occurrence, unless it is prevented by the fear of the law. On this account, without attempting to review the cases (which would be an endless task), I will endeavor to give the reasons on which the law is based, whereby the proper applications of its principles will be made clear.

Manslaughter is of two kinds: (1) When the killing is in the heat of blood. (2) When the killing is by accident or mistake, arising from negligence or a want of due precaution.

(459) 1. If A. is about to strike B., who is unwilling to enter into a fight, and shows it by words or actions, or otherwise, as by going back, or warns A. not to strike, and A. presses on and strikes, or attempts to strike, and thereupon B. kills with a deadly weapon, it is manslaughter; for there is legal provocation, and the law ascribes the killing to "heat of blood," and not to malice.

2. If, on a sudden quarrel, the parties begin a fight by consent, *without deadly weapons*, and, after blows pass, one uses a deadly weapon and kills, it is manslaughter; for by the excitement of the fight the blood is heated, and the killing is done not of malice, but in the *"furor brevis,"* which the law, out of indulgence to human frailty, allows to mitigate the offense, although the party had himself committed a breach of the peace by entering into the fight willingly.

3. If on a sudden quarrel the parties fight by consent, *at the instant, with deadly weapons*, and one is killed, it is but manslaughter, *provided the parties fight on equal terms and no undue advantage is taken;* for the *fairness* of the fight rebuts the implication of malice, and the law mitigates the offense, out of indulgence to the frailty of human nature.

Which of these three principles is applicable to our case? When it is proved that one has killed intentionally, with a deadly weapon, the burthen of showing justification, excuse, or mitigation is on him. It is admitted the prisoner killed intentionally, with a deadly weapon. He does not show, by his words or actions, that he declined to fight, or give back, or warned the deceased not to strike. So the first principle does not apply. The parties did not begin the fight *without* deadly weapons. So the second principle does not aply. The parties fought, by *consent,* with deadly weapons; so the case falls under the third principle, and the question is narrowed to this, Does the principle in regard (460) to a fair fight apply? or does the case fall under the exception in regard to a fight on unequal terms and when undue advantage is taken? This is too plain for discussion. The prisoner, having his weapon ready, took his adversary at a disadvantage, and stabbed him in the side while he was in the act of turning round to face him, and before he was "on his defense." This dastardly act excludes the idea that he entered into the fight in compliance with the common notions of honor, and shows that he "sought the blood" of the deceased.

The principle by which a killing in a *fair* fight, with deadly weapons, is mitigated, was adopted at a time when every gentleman wore a sword; and the custom was, on offense given, to draw and fight. Such fights, owing to the expertness of the combatants in defense, were not often fatal. Manners have since changed. No one in private life now wears a sword; and how far this may affect the principle is a serious question; but it is certain that a fair fight at the instant with deadly weapons is now a rare occurrence. When one has a knife, and the other a stick or a pistol they are not on equal terms; and the purpose of each is to take advantage and give a mortal blow as soon as possible. Such cases fall under the exception; the party killing is a murderer, and there is nothing to mitigate.

If, as contended by Mr. Eaton, in a "mutual combat" with deadly weapons the offer to strike amounts to a legal provocation, neither party would ever be guilty of more than manslaughter; for each could say, "My adversary was about to strike with a deadly weapon" So it would make no difference whether the fight was declined or entered into willingly, or was fair or unfair—and the law would encourage a hasty resort to deadly weapons, and an unfair use of them, by saying, "You need not show that you declined to fight, and attempted to avoid it; you need not show that you took no undue advantage. Use your weapon as soon as you can, and take all advantages! for if your adversary is (461) about to strike, it is a legal provocation, although you are also about to strike, and whichever kills will only be guilty of manslaughter." This would only lead to horrid consequences, and completely upset and

confound all the principles which have been so carefully adopted to deter men from the use of deadly weapons and at the same time extend a reasonable indulgence to the frailty of human nature.

The learned counsel did not insist with much earnestness that the case could be brought under the second kind of manslaughter. One or two instances will show that the doctrine has no application, viz.:

1. If one handles a loaded gun so negligently that it goes off and kills, it will be excusable homicide or manslaughter, according to the degree of negligence.

2. An officer pushed abruptly and violently into a gentleman's chamber early in the morning to arrest him, not telling his business or using words of arrest. The gentleman, *not knowing that he was an officer,* under the first impulse, stabbed him with his sword. It was ruled manslaughter at common law, for the prisoner, not knowing the officer's business, might, from his behavior, *reasonably conclude* that he was about to rob or murder him. *Cook's case,* Cro. Car., 538.

3. Upon an outcry of thieves, in the night-time, a person who was concealed in a closet, but no thief, in the hurry and surprise the family was under, was stabbed in the dark. This was holden to be an innocent mistake, and ruled *chance-medley. Lever's case,* cited in *Cook's case, supra.* Foster, at page 299, observes of this case: "Possibly it might have been better ruled manslaughter, due circumspection not having been used. In all cases when the offense is mitigated because the party acted under a mistake, for which there was reasonable ground, if the danger had been real, the act would have been justifiable." In our case
(462) the danger was real—the deceased was about to strike with a deadly weapon; and if this doctrine applies, the killing was justifiable, and the prisoner ought to have been acquitted. *Reductio ad absurdum.*

The second objection to the charge is not tenable. From the view we have felt bound to take of the case, the judge is considered as having, in effect, instructed the jury that, putting the testimony of the witnesses on the part of the State out of the case, as an intentional killing with a deadly weapon was admitted, the testimony of the prisoner's witnesses did not mitigate the offense to manslaughter; and the prisoner has no right to complain because the instruction assumes that what his own witnesses swore to was true.

The third objection is not tenable. The position "that the principle on which the doctrine of reasonable doubt is grounded is as much applicable to the grade of the homicide as it is to the fact of the homicide" is not true. The error consists in not attending to the distinction, that the fact of the homicide must be proved *by the State;* but if found, or admitted, the *onus* of showing justification, excuse, or mitigation is upon

the *prisoner*. At page 290 Foster says: "Whoever would shelter himself under the plea of provocation must prove his case to the satisfaction of the jury"; the presumption of law is against him "till the presumption is repelled by contrary evidence." At page 255 the matter is explained at large.

The principle on which the doctrine of reasonable doubt as to the fact of the homicide is grounded is that, in *favor of life*, the fact which *the State* is required to establish must be proved beyond a reasonable doubt. It certainly would not be in favor of life to apply this doctrine to matter of mitigation, which the *prisoner* is required to establish. Hence, in regard to that, the rule is, the jury must be satisfied by the testimony that the matter offered in mitigation is true.

There is no error. (463)

NOTE.—A judge must declare and explain to the jury the law arising on the evidence. *S. v. Dunlop*, 65 N. C., 288; *Smith v. Smith*, 72 N. C., 159; *S. v. Gaither*, 72 N. C., 458; *Hill v. Sprinkle*, 76 N. C., 353.

If two fight upon a sudden quarrel, and one kills the other, the chances being equal, this constitutes *manslaughter*. *S. v. Massage*, 65 N. C., 480.

If A. assaults B., giving him a severe blow, and B. strikes him with a deadly weapon and death ensues, it is *manslaughter*. If the provocation from A. is slight, and B. strikes, and it appear from the weapon used, or other circumstance, that B. intended to kill A. or do him bodily harm, and death ensues, it is *murder*. *S. v. Smith*, 77 N. C., 488.

Upon a trial for murder, the fact of killing with a deadly weapon being proved, it is incumbent upon the prisoner to establish matter of mitigation, neither beyond a reasonable doubt nor according to the preponderance of testimony, but *to the satisfaction* of the jury. *S. v. Willis*, 63 N. C., 26; *S. v. Haywood*, 61 N. C., 376. If the jury are left in doubt, it is *murder*. *S. v. Smith*, 77 N. C., 488.

Cited: S. v. Willis, 63 N. C., 27, 29; *S. v. Smith*, 77 N. C., 489; *S. v. Payne*, 86 N. C., 610; *S. v. Brittain*, 89 N. C., 502; *S. v. Carland*, 90 N. C., 675; *S. v. Mazon, ib.*, 683, 684; *S. v. Kennedy*, 91 N. C., 577; *S. v. Vines*, 93 N. C., 498; *S. v. Gooch*, 94 N. C., 1002; *S. v. Byers*, 100 N. C., 518; *Harding v. Long*, 103 N. C., 5; *S. v. Rollins*, 113 N. C., 734; *S. v. Barringer*, 114 N. C., 841; *S. v. Neal*, 120 N. C., 621; *S. v. Byrd*, 121 N. C., 686; *S. v. Barrett*, 132 N. C., 1012; *S. v. Lipscomb*, 134 N. C., 695; *S. v. Clark, ib.*, 702, 714; *S. v. White*, 138 N. C., 718; *S. v. Quick*, 150 N. C., 824; *S. v. Bradley*, 161 N. C., 293; *S. v. Pollard*, 168 N. C., 120; *S. v. Kennedy*, 169 N. C., 295.

THE STATE v. M. B. EDNEY.

(2 Winst., 71.)

1. A judge, being possessed of jurisdiction over the person of a prisoner by any proceeding before him, may adjudge that he be allowed bail, and make an order that his recognizance be taken by a justice or justices of the peace, named by him, in a sum fixed by him; and a recognizance taken according to the order is valid.

2. An instrument of writing, executed with intention to comply with such an order, in form a bond, signed and sealed by the prisoner and his surety, on the prisoner's being let out of prison, and received by the justices named, by them returned to the proper court, and by its order filed as a record, is a *recognizance.*

3. Taking a recognizance consists merely in making and attesting a memorandum of the acknowledgment of a debt due to the State, and of the condition on which it is to be defeated.

4. Presenting a petition to a judge for a writ of *habeas corpus* gives him jurisdiction of the subject, and the parties may waive all errors and dispense with all forms in the proceedings on it.

5. Where a petition for a *habeas corpus* was presented to a judge, in order that the petitioner might be admitted to bail, and the judge gave no formal judgment, but informally expressed his opinion in writing on the petition that the prisoner was entitled to bail, and signed his name *officially* to a sheet of paper, that a writ might issue if the parties desired it; and, by the consent of the solicitor for the State, suggested that bail might be taken without any further proceedings on the petition, and fixed the amount in which bail should be taken, and named the justices of the peace to take it, and the prisoner was afterwards discharged from prison, on his entering into a recognizance, together with the defendant as his surety, in the sum fixed by the judge, before the justices named by him, and the prisoner and defendant subscribed their names and affixed their seals to the recognizance: this is plenary proof of a waiver of all errors in the proceedings.

6. It *seems* that the defendant would be *estopped* by the recital that, "upon application to the judge, he had ordered that the prisoners be allowed bail in the sum of $2,000 each, and had authorized the two justices to take the recognizance."

(464) THIS was a *scire facias* to show cause why an execution should not issue on a forfeited recognizance, and was tried before *Reade, J.,* at BUNCOMBE Spring Term, 1864, on the plea of *nul tiel record.*

The State gave in evidence a record of the Superior Court of Law of Buncombe County, setting forth that at Spring term of that court, "B. J. Smith and W. W. McDowell, justices of the peace of said county,

brought into court paper-writings of the tenor following, to wit:" (Here was inserted the petition of J. A. Shock and five others, addressed to the Hon. William M. Shipp, one, etc., praying for a writ of *habeas corpus,* in order that they might be bailed.) The record then proceeded: "Upon the facts stated in this petition, I think the parties entitled to bail. Therefore, by the suggestion of the solicitor, without the formality of a writ, and to save trouble and expense, I suggest that they be admitted to bail in the sum of $2,000 each, and that B. J. Smith (465) and W. W. McDowell take bond for their appearance at the first Superior Court to be held after this time. If the suggestion is not adopted, the writ must issue above my name, which is signed near the bottom of this sheet.

W. M. SHIPP.

5 February, 1864.

"W. M. SHIPP, J. S. C. L. E."

Know all men by these presents, that we, J. A. Shock, Carol Walton, James T. Holbert, Daniel Mayberry, G. W. Walker, and B. M. Edney, are held and firmly bound to the State of North Carolina in the sum of $2,000, for the faithful payment whereof we hereby bind ourselves, our heirs, executors, and administrators.

The condition of the above obligation is such: Whereas, the above bounden, J. A. Shock, Carol Walton, James T. Holbert, Daniel Mayberry, and G. W. Walker, have been committed to the common jail in and for the county of Buncombe in said State, charged with the crimes of larceny, robbery, and burglary; and whereas, on application to the Hon. W. M. Shipp, one of the judges of the Superior Courts of Law and Equity in and for said State, he has ordered that the said last parties be allowed bail in the sum of $2,000 each, the bond to be received by B. J. Smith and W. W. McDowell, justices of the peace: now if the said J. A. Shock, Carol Walton, James T. Holbert, Daniel Mayberry, and G. W. Walker, and each of them, shall well and truly make their and his personal appearance before the judge of the Supe- (466) rior Court of Law to be held in and for the county of Buncombe aforesaid on the sixth Monday after the fourth Monday in April, A. D. 1864, and if they and each of them shall well and truly make their and his personal appearance before the judge of any court of oyer and terminer that may be ordered to try criminal cases in and for the county of Buncombe aforesaid, at any time before the said Superior Court, and not depart the court aforesaid until lawfully discharged, then the above obligation to be void; otherwise, to remain in full force and effect. And it is expressly understood that the above bond is for the several appear-

ance of the last named parties; and that the forfeiture is to be the forfeiture of the said sum of $2,000 for the default of each and every one of the said last named parties.

Test: (Signed) P. C. WALTON, [SEAL]
(Signed) JAMES T. HOLBERT, [SEAL]
(Signed) DANIEL His × mark. MAYBERRY, [SEAL]
(Signed) J. A. SHOCK, [SEAL]
(Signed) G. W. WALKER, [SEAL]
(Signed) B. M. EDNEY. [SEAL]

Approved:
W. W. MCDOWELL, J. P.
Approved:
B. J. SMITH, J. P.

And the said papers and recognizance were ordered by the court to be entered of record and were duly entered accordingly, and at the same term of the court the following proceedings were had, to wit:

(467) "The said defendant is called on his recognizance, and failed to answer and appear. Let *scire facias* issue according to law. Judgment *nisi* against the defendant and his surety, B. M. Edney, for the sum of $2,000."

The court adjudged that there was no such record as is supposed by the *scire facias*.

The State appealed.

Attorney-General for the State.
W. H. Bailey for defendant.

PEARSON, C. J. In support of the plea, *"nul tiel record,"* the defendant takes three grounds. This Court is of opinion that neither is tenable.

1. "The judge had no power to authorize the justice of the peace to take the recognizance."

When a judge, in a proceeding initiated before him, adjudicates that the party is entitled to be discharged on giving bail, and fixes the amount, it has long been the practice in this State, if the party be not prepared with sureties, for the judge to authorize one or more justices of the peace, named by him, to take the recognizance; and recognizances so taken have heretofore, as far back as the memory of the members of this Court extends, always been deemed valid. This practice has prevailed so long, and is so obviously for the ease of the citizen, that we would not be justified in now putting a stop to it, unless satisfied that it is in violation of some important principle of law. It is true, a judicial func-

tion cannot be delegated; but after the judge has decided that the party is entitled to be discharged on giving bail, and has fixed the amount, all of the questions presented by the proceedings are disposed of, and nothing remains to be done but to carry the adjudication into execution; and there is no reason why the judge may not authorize a justice of the peace to do it; for all he has to do is to pass on the sufficiency of the surety, and to attest the fact that the recognizance is entered into. The former involves no question of law, but is a matter of fact, which may be ascertained by one man, who is authorized to administer (468) an oath, as well as another; and although in strictness it may be deemed an act of a judicial nature, it affords rather a technical than a substantial objection to the practice. The latter is a mere ministerial act, which requires no exercise of judgment, either in respect to a matter of law or of fact, and is done by hearing the recognizance and making and attesting a "minute" or memorandum by which a formal recognizance may be afterwards drawn up. For instance: "A. B. recognized in $1,000 to appear at, etc." "C. D. recognized as surety in a like sum." In *S. v. Hill,* 25 N. C., 398, *Judge Ruffin* sanctions the practice and intimates an opinion that it may be supported on the ground that a justice of the peace has power, *virtute officii,* to take recognizances; and the effect of the order of the judge is simply to enable the justice to obtain control of the body, which he could not otherwise do, having no power to issue a writ of *habeas corpus.* So the authority conferred by the judge is not a delegation of a judicial function, but the substitution of one judicial officer in place of another, in respect to a minor part of the proceeding, the main questions having been disposed of.

2. "The judge made no adjudication allowing the prisoner to give bail, and no order authorizing the justice of the peace to take the recognizance."

It is true, an adjudication that the prisoner is entitled to be discharged on giving bail is not formally set out, and there is no formal order authorizing the justices to take the recognizance. But these things are done in substance, and all errors are waived by consent. The facts are: the petition is filed, and the judge decides that the writ should issue, and for this purpose signs his name *officially,* and directs the formal words to be inserted, and the writ to issue, if necessary; but for the sake of saving "expense and trouble," with the consent of the solicitor for the State, he expresses his opinion that on the facts stated the petitioners are entitle to be discharged on giving bail for their ap- (469) pearance, fixes the amount at $2,000 for each, and suggests that the recognizance be taken by two justices of the peace, whom he names, without the formality of a writ. This suggestion is accepted and acted on. The justices named treat the matter as if the judge had allowed

the prisoners to give bail, and authorized them to take it. This is done with the consent of the solicitor, and of the prisoner, and of the defendant, who was offered as surety, and they admit under their hands and seals that, *"upon application to the judge, he had ordered that the prisoners be allowed bail in the sum of $2,000 each, and had authorized the two justices to take the recognizance,"* which is done, and the prisoners thereupon discharged.

There is force in the suggestion that, on the authority of *Iredell v. Barbee,* 31 N. C., 250, and *United States v.* (*sic*), 2 Brockenborough, 115, these admissions, made in a solemn manner and acted on for the benefit of the prisoners, amount to an estoppel, and conclude the parties from gainsaying the matters admitted. However this may be, it is clear that if the admissions do not operate by way of estoppel, they constitute *plenary evidence* of consent to "waive all errors" and dispense with all parts of the proceeding preliminary to taking the recognizance which it was in the power of the parties to dispense with.

It is true, "consent cannot confer jurisdiction"; but we are of opinion that the jurisdiction of the judge attached, and the proceeding was regularly constituted before him, by filing the petition; and all errors of form could be waived, and all formal parts of the proceeding be dispensed with, by consent. For instance, if the parties consent that the body need not be produced, and, on the return, setting out "the cause of detention," the judge disposes of the question, his ruling is binding. This shows that, after the proceeding is regularly constituted, the parties may, by consent, treat the production of the body as a matter of
(470) form, and dispense with it, although it is usually the most important part of the proceeding, and the judge cannot dispose of the matter unless the body is produced, or considered as present, by consent, and error waived.

So, after the petition is filed, if the parties submit the questions on a "case agreed," waiving, by consent, the necessity for issuing a writ, I apprehend the ruling would be binding; for the purpose of the writ is simply to compel the production of the body, together with the cause of detention; and if that purpose be answered, the writ may be treated as matter of form, and waived by consent. Our case is stronger, for the judge signed his name officially, with directions to insert the formal words; and the writ, so far as his action was concerned, had issued, and further proceedings on it were dispensed with by consent.

It is also true that it was irregular for the judge to give his opinion that, on the facts stated, the prisoners were entitled to be discharged on giving bail, and to fix the amount and name the justices of the peace *before and in anticipation* of the consent of the prisoners to waive errors and dispense with formal proceedings; but, as this consent was after-

wards, while the proceeding was pending, given in the fullest manner, the irregularity was cured; and it would have been an idle form for the judge to repeat his opinion, and to state the amount of the bail, and name the justices of the peace a second time.

3. "The recognizance is not in due form, and was not taken as authorized by the judge."

We stated, under the first head, what is necessary in order to take a recognizance.

These requisites are complied with. The signing and sealing by the prisoners and defendant were not necessary to give validity to the recognizance; but, in respect to *that,* it does no harm; and in respect to the consent to waive errors, etc., we have seen, under the second head, that it had a very important bearing. (471)

Whether the defendant can be made to pay more than one sum of $2,000, by a proper construction of the instrument, is a question not presented in this case.

There is error. Judgment reversed and judgment for the State according to *scire facias.*

Cited: S. v. Houston, 74 N. C., 176; *s. c., ib.,* 550; *S. v. Jones,* 100 N. C., 440; *S. v. White,* 164 N. C., 410.

THE STATE v. JAKE.

(2 Winst., 80.)

1. It is not burglary to break and enter a smokehouse thirty-five steps from a dwelling-house, the dwelling-house having no inclosure around it.

2. A log cabin belonging to the owners of a tobacco factory, in which the superintendent of the factory usually slept, is a dwelling-house, in which burglary may be committed.

INDICTMENT for burglary, tried before *French, J.,* at Fall Term, 1864, of PERSON.

The evidence relative to the points on which the case turned in this Court was that Alexander Walker and two others were owners of a tobacco factory in Person County. The factory, and a smokehouse appurtenant to it, were inclosed—one wall of the smokehouse and one wall of the factory forming part of the inclosure. The smokehouse was 15 feet from the factory. There was a log cabin about 35 or 40 steps from the smokehouse, belonging to the owners of the fac- (472)

tory, and occupied by the superintendent of the factory, who usually slept in it. This house was not inclosed. The superintendent sometimes kept the key of the house. There was evidence to show that the smokehouse had been broken and entered in the night by the prisoner, and that some bacon had been stolen from it by him.

The jury found the prisoner guilty, under the instructions of the judge.

Attorney-General for the State.
Graham for prisoner.

BATTLE, J. Burglary, at common law, is defined to be the breaking and entering the dwelling-house of another, in the night-time, with intent to commit a felony therein. Roscoe Cr. Ev., 298; *S. v. Langford,* 12 N. C., 253; *S. v. Jenkins,* 50 N. C., 430. Every permanent building in which the owner or renter and his family, or any member thereof, usually and habitually dwell and sleep is deemed a dwelling in which this crime may be committed. See Roscoe Cr. Ev., 299, and the authorities there referred to, and *S. v. Jenkins, ubi supra.* The term "dwelling-house" includes within it not only the house in which the owner or renter and his family, or any member of it, may live and sleep, but all other houses appurtenant thereto, and used as part and parcel thereof, such as kitchen, smokehouse, and the like: provided they are within the curtilage, or are adjacent or very near to the dwelling-house. *S. v. Langford, ubi supra; S. v. Whit,* 49 N. C., 349. If the kitchen, smokehouse, or other house of that kind be placed at a great distance from the dwelling, and particularly if it stand outside of the curtilage or inclosed yard,

(473) it cannot be considered a part of the dwelling-house for the purpose of being protected against a burglary. The reason is that the law protects from unauthorized violence the dwelling-house and those which are appurtenant, because it is the place of the owner's *repose;* and if he choose to put his kitchen or smokehouse so far from his dwelling that his *repose* is not likely to be disturbed by the breaking into it at night, it is his own folly. In such cases the law will no more protect him than it will when he leaves his doors or windows open. *S. v. Langford, ubi supra.*

The principles which we have thus stated as establishing the kind of house in which a burglary may be committed, we do not understand the counsel on either side to dispute. In their application to the facts of the case now before us, the counsel for the prisoner contends: (1) That the house in which the superintendent Pulliam slept was not such an one as the law recognizes as a dwelling-house; and (2) if it were, the smoke or meat house which was broken open was so situated in reference to it that it could not be considered as a part or parcel of it.

Upon the first point, our opinion is against the position taken by the prisoner's counsel. The building is described to be a small log house, and is called a log cabin; but it appears to have been a substantial, permanent one, and therein differs from a tent or a booth erected in a market or fair, in which no burglary could be committed, although the owner lodges in it. See 1 Hawk. Pl. Cr., ch. 38, sec. 35; 1 Hale, Pl. Cr., 559; Roscoe Cr. Ev., 300. This house was in truth the dwelling-house of the owners of the tobacco factory, and not of the superintendent, Pulliam, he being only their servant or employee. See *S. v. Curtis,* 20 N. C., 222. But if it were taken to be the dwelling of Pulliam, there is a count in the indictment which so states it.

As to the second position taken for the prisoner, there is per- (474) haps more doubt, but upon mature consideration we think it is in his favor. The dwelling-house in which Pulliam usually slept was uninclosed, and of course had no curtilage or inclosed yard; and the smokehouse stood upwards of a hundred feet from it. The factory and the smokehouse had a common inclosure, from which the log dwelling was excluded. Under these circumstances, it seems too much to say that the smokehouse was appurtenant to the log dwelling-house. Indeed, it did not appear to have been used as such; for Pulliam, who slept in it, did not carry the key to it, except occasionally; that being usually carried by the acting manager of the partnership, who lived and slept in a dwelling-house about a quarter of a mile off. The smokehouse was doubtless used for the purpose of storing meat and other things for the use of all the persons, white and black, who were engaged in the tobacco factory established at that place. It was the "carelessness or indifference" of the proprietors which placed it in such a situation that it would not enjoy that protection which the law affords against a burglarious entry.

PER CURIAM. Error.

NOTE.—As to what is a dwelling-house, etc., in which burglary can or cannot be committed, *vide S. v. Mordecai,* 68 N. C., 207; *S. v. Outlaw,* 72 N. C., 598; *S. v. Potts,* 75 N. C., 129. As to persons in whom to charge the property, *vide S. v. Outlaw,* 72 N. C., 598; *S. v. Wincroft,* 76 N. C., 38; *S. v. Matthews,* 76 N. C., 41; *S. v. Davis,* 77 N. C., 490.

Cited: S. v. Pressley, 90 N. C., 733.

R. V. HIX v. ALLEN FISHER.

(2 Winst., 84.)

The Superior Court has no jurisdiction to decide whether a deposition be regularly taken, except on appeal from the clerk's decision, in pursuance to sec. 63, ch. 31, Rev. Code, or when it is offered to be read in evidence on a trial; therefore, an appeal under ch. 4, sec. 23, Rev. Code, from the decision of a judge on that question does not lie to the Supreme Court, unless the record shows that the judge had acquired jurisdiction in one of these two ways.

(475) THE case is stated in the opinion of the Court.

Merrimon for plaintiff.
W. H. Bailey for defendant.

BATTLE, J. This is an appeal from an interlocutory order made in the Superior Court of Haywood County by *Reade, J.* In the argument here it was said by the counsel that the order was made in a proceeding to review the decision of the clerk in passing upon the sufficiency of a deposition as prescribed in Rev. Code, ch. 31, sec. 63. But the record does not show that the clerk had passed upon the deposition at all, and of course does not show that there was any appeal from any order made by him. The order of the judge does not appear to have been made on the trial of the cause, for, so far as the record shows, there was no jury impaneled to try it. All that appears from the record is that the deposition was brought to the notice of the court preparatory to the trial, and the question was submitted to the presiding judge, whether it was taken under such circumstances as would allow of its being read on the trial, and he decided against its admissibility. Such being the case, he had no jurisdiction to make the order, and there having been no cause before the court, there could be no appeal under section 23 of chapter 4 of the Revised Code. The consequence is that the appeal must be dismissed as having been improvidently granted. Whether, if the record had shown an appeal from the decision of the clerk to the court, the judge might have decided on the appeal, before the jury was impaneled in the cause, and allowed an appeal from his order to this Court,
(476) or whether it was necessary to offer the deposition on the trial, and let its admission or rejection form an item in a bill of exceptions, is an interesting question of practice which we will not undertake to decide until it is properly brought before us.

The appeal must be dismissed at the cost of the appellant.

PER CURIAM. Appeal dismissed.

THE STATE v. J. R. BRYSON.

(2 Winst., 86.)

1. The declarations and admissions of a party to a suit, civil or criminal, pertinent to the issue, may be given in evidence against him by the other party.

2. It is not the belief, simply, of a man that he is about to be stricken which will justify him in striking first, but his belief founded on reasonable grounds of apprehension.

3. One who seeks a fight, or provokes another to strike him, cannot justify returning the blow on the ground of self-defense.

4. If two men fight by consent, they are guilty of mutual assaults and batteries, no matter who committed the first assault or struck the first blow.

INDICTMENT for an assault and battery by the defendant on L. S. Gash, tried before *Reade, J.*, at Fall Term, 1864, of HENDERSON.

The State offered evidence tending to show that the defendant met Gash in the street and knocked him down with his walking cane, without provocation. The defendant offered evidence tending to show that at the time he struck Gash, Gash had a knife in his hand, held up in a striking position at the distance of 4 or 6 feet from him. (477) The State offered evidence tending to show that a short time before the fight the defendant said that he intended to give Gash a caning. The defendant objected to his declarations being given in evidence, but the court admitted them.

The defendant's counsel asked the court to charge the jury that if defendant, at the time he struck Gash, believed that Gash was about to strike him with the knife, that then the defendant had a right to strike him first. The court declined so to charge, but instructed the jury that if defendant struck Gash, he was guilty, unless he struck him in self-defense; that if the jury believed that the defendant had good reason to believe, and did believe, that Gash was about to strike him, that then the defendant had the right to strike him first, unless the jury believed that the defendant sought the fight or provoked Gash to attack him; in which case the defendant would be guilty.

Verdict, guilty, and judgment accordingly, from which defendant appealed.

Attorney-General for the State.
W. H. Bailey for defendant.

MANLY, J. This case is brought before us upon exceptions to the ruling of the court below, in a matter of evidence, and also for the refusal of the judge to give certain instructions asked for, and for giving other instructions alleged to be erroneous.

1. We are not informed of any ground upon which the evidence is deemed inadmissible. Ordinarily, in both civil and criminal causes, the declarations and admissions of one party may be introduced by the other. There are exceptions to this rule, but the case before us does not fall under any of these exceptions.

(478) The defendant was indicted for a battery on L. S. Gash, and, on the trial, his case was made to turn on the question whether the battery was in self-defense or otherwise. His previous declarations, that he intended to give Gash a caning, were certainly pertinent to the inquiry, and, therefore, for aught we can see, admissible.

2. The instructions asked for were properly refused. The court was requested to charge the jury that "if defendant, at the time he struck Gash, believed Gash was about to strike him with the knife, that then the defendant had the right to strike Gash first."

A right to act in self-defense does not depend upon the special state of mind of the subject of inquiry. He is judged by the rules which are applicable to men whose nerves are in an ordinary sound and healthy state; and whatever may be his personal apprehensions, if he has not reasonable ground to support them, he will not be protected by the principle of self-defense.

The normal condition of the human passions and faculties must be regarded in establishing rules for the government of human conduct. The question, then, in such cases as the present, is not what were the apprehensions of the defendant, but what they ought to have been when measured by a standard derived from observation of men of ordinary firmness and reflection. This is what is called reasonable ground of belief, and is the rule for judging of a case of self-defense, upon an indictment for an assault and battery. Therefore a prayer for instruction which assumed that one's personal feelings and apprehensions, however eccentric and morbid these might be, determined the character of his conduct, was properly refused.

3. It will be found, from a consideration of what has been said above and from other plain principles of law, that the instructions actually given are in conformity with law.

(479) The portion which we suppose is objected to is, "If the defendant had good reason to believe, and did believe, Gash was about to strike him, then the defendant had a right to strike first, unless the defendant sought the fight and provoked an attack." This is correct, and is one of the plainest principles pertaining to the law of assault and battery. If two men fight by consent (which consent may be inferred from language and conduct), the parties are guilty of mutual assaults and batteries, no matter who committed the first assault or struck the first blow.

PER CURIAM. 306 No error.

NOTE.—For discussion of the distinctions between attempts to strike and offers to strike, see *S. v. Myerfield*, 61 N. C., 108, as to when one may strike in self-defense; *vide S. v. Dixon*, 75 N. C., 275; *S. v. Harman*, 78 N. C., 515; *S. v. Medlin, post*, 488; when in defense of his father, *S. v. Johnson*, 75 N. C., 174. If one provokes an affray by any language or conduct of his own, he is guilty; *S. v. Robbins*, 78 N. C., 431.

Cited: *S. v. King*, 84 N. C., 741; *S. v. Williford*, 91 N. C., 532; *S. v. Mills, ib.*, 596.

DOE ON DEMISE OF ALEX. RILEY v. RICHMOND BUCHANAN.

(2 Winst., 89.)

A devise "to Alexander Riley for him and his mother and the rest of the children to live on until the youngest becomes of age" is a gift of the fee simple to A. R.

EJECTMENT tried before *French, J.*, at Spring Term, 1864, of ANSON. The case is fully stated in the opinion of the Court.

R. H. Battle for lessor of plaintiff. (480)
Winston, Sr., for defendant.

MANLY, J. Upon the case agreed, this Court is of opinion with the plaintiff. The controversy arises upon the construction of the following paragraph in the will of Henry Buchanan:

"5th Item. I give and devise to Alexander Riley one tract of land on which I now live, known as the Dickson tract of land, for him and his mother and the rest of the children to live on, until the youngest becomes of age; also, a negro boy named Alfred," etc.

The question is, whether Alexander Riley takes a fee simple in the land, or a term to last only through the minority of the youngest child. There is a general residuary paragraph in the following words:

"7th Item. I give and bequeath to my son, Richmond, all the remaining part of my property, or all my property not otherwise disposed of; and should Richmond die," etc. The legatee, Richmond, herein named, who is the defendant in this suit, claims the remainder in the land after the arrival at age (21) of the youngest child, which event has happened.

The language of the paragraph and the silence of the will in all its parts as to any remainder in land lead to the conclusion that it was testator's intention to give the entire legal estate to Alexander Riley.

"I give and devise to Alexander Riley one tract of land" is not the language which a testator usually employes when carving out a particular estate in land. "I *lend*" or "I give until" would be more obvious and natural.

There is no allusion in any part of the will to a supposed remainder in this important portion of his estate; and there is nothing in the *residuary item* to induce a belief that it was then in any way present to his mind. Our duty, therefore, is plainly indicated by the rule of construction laid down in the statute law, Revised Code, ch. 119, sec. 26,

which is in these words: "When real estate shall be devised to
(481) any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity."

The gift, by virtue of this declared will of the Legislature, must then be held to be a gift in fee simple, for there is nothing in the will to qualify or limit it. The words annexed to the gift, "for him and his mother and the rest of the children to live on until the youngest becomes of age," seem to be an inartificial way of creating a trust for a limited term, and may well be interpreted in that sense. Indeed, we cannot suppose that it was the intention of the testator, in so obscure a way, to qualify his former words of bequest, and to limit an estate for a term of years only.

There must be a judgment affirming that below, viz., that the plaintiff recover his term, etc.

PER CURIAM. Affirmed.

RICHARD HARRIS, ADMINISTRATOR, ETC., v. EBEN HEARNE.

(2 Winst., 92.)

These words in a will, "I give to my daughter, Susannah, four slaves, named, etc., to her and her heirs: *Provided, nevertheless*, if the said Susannah die childless, then it is my desire that my son Aaron remove back to this country, and to have them, but not to take them to any other part of the country," do not import a *condition* that Aaron shall return to this country.

(482) ACTION of trover for slaves, tried before *French, J.*, at STANLY Fall Term, 1863. There was a verdict for the defendant, by the direction of the judge. The plaintiff appealed.

Edward Almond, of Stanly County, by his will gave to his "daughter Susannah, four slaves, named, etc., to her and the heirs of her body: *Provided, nevertheless*, that if the said Susannah shall die childless, then

and in that case it is my desire that my beloved son, Aaron Almond, shall remove back to this country, and have them, but not to take them to any other part of the country." The testator gave legacies to other sons and daughters, and to the children of a deceased daughter. There was no gift over of the four slaves in case Aaron did not return to this country, or of his carrying the slaves out of this country. The will contained this clause: "I will that the remainder of my property be sold and the proceeds . . . divided among my children, as follows," etc.

At the time of the making of the will Aaron Almond lived in Tennessee, and he has never been in Stanly County since. The plaintiff is the administrator with the will annexed of the testator. The defendant is in possession of the slaves given to Susannah as above recited, claiming them as the purchaser from Aaron.

Dargan and R. H. Battle for plaintiff.
Moore for defendant.

PEARSON, C. J. We concur with his Honor in the opinion that the executory bequest to Aaron Almond of the slaves in the event that the first taker, Susannah Almond, should die childless, on the happening of the event, vested absolutely in Aaron, and was not defeated (483) by the fact "that he did not remove back to this country."

The *wish* of the testator that, "should his daughter die childless, his son should remove back to this country and have them (the slaves), but not to take them to any other part of the country," does not have the effect of a condition precedent to the limitation over to him, whereby it was to be defeated, but must be considered simply as the expression of an earnest wish, in respect to what he supposed would benefit the slaves, without impairing the right of property which he intended should vest in his son. In the language of the books, these words are "precatory," not "mandatory."

We are led to this conclusion by several considerations, which it is not needful to elaborate much at large.

1. Such a restriction on the right of property, as a *condition,* is impracticable and incompatible with the nature of personal property. This must have been known to the testator. So it is unreasonable to suppose that he intended to impose a *condition* and meant that his son should not have the slaves unless he complied with it. On the other hand, it is reasonable to suppose that the testator, having a decided wish on the subject should recommend and ask his son to come back to this country and keep the slaves here, should his daughter die childless; on which event the negroes are to belong to the son.

2. The severest test that a *condition* is intended is a provision by which it is to be enforced: as by making a limitation over to some one

else on breach of the condition. The testator had other children and grandchildren, as appears by the will, who lived in this country; and if Aaron was not to have the slaves, should Susannah die childless, *unless he removed back to this country,* and the testator meant to
(484) insist on it as a condition, he would have added a provision: "If Aaron does not remove back to this country, then the slaves are to belong to my son Edmond, or to the children of my daughter Polly, or such of them as will take them on the condition that they are not to be taken out of the country"—so as to leave no doubt that it was his *primary* intention that the slaves should not be taken out of the country.

The absence of a limitation over makes a broad distinction between this case and *Reeves v. Craig, ante,* 208—besides the fact that in that case direct words of condition are used, "but if Mary is dead or does not release, I give the land to my children," and not words simply expressing a wish.

PER CURIAM. Affirmed.

THE STATE v. WILLIAM S. COCKMAN.

(2 Winst., 95.)

1. If an indictment for murder charges that A. killed the deceased, and that others were present, aiding and abetting, and it is proved that the deceased was killed by some one with whom A. was acting in concert, and that A. was present, aiding and assisting, the jury should be instructed to find A. guilty.

2. If a challenge by the prisoner for good cause be disallowed, and the juror be challenged peremptorily by the prisoner, and the panel is completed, the prisoner having challenged peremptorily a smaller number than twenty-three, this is no cause for a *venire de novo.*

3. A juror, challenged by the prisoner because he had formed and expressed an opinion that the prisoner was guilty, says on his examination by the court that he has formed and expressed an opinion to that effect from rumor, but that he thinks he can give an impartial verdict on the trial, is adjudged by the court to be indifferent between the parties, and is tendered to the prisoner: this is no error of which the prisoner can complain.

(485) INDICTMENT for the murder of John C. Howard, tried before *Gilliam, J.,* at Fall Term, 1864, of MOORE.

The indictment charged that the deceased, John C. Howard, was killed by the prisoner, and that others, to the jurors unknown, were present, aiding and abetting him in the act of killing.

"In forming the jury, the prisoner challenged one Donald McDonald, and assigned for cause that he had formed and expressed an opinion that

the prisoner was guilty. The juror, on his oath, stated that he had formed that opinion, but had not before expressed it; that his opinion was formed on rumor alone; that he had great confidence in the truth of the rumors he had heard, and that he was afraid they might have some influence on his judgment." Upon his further examination, he said that "he was satisfied he could render an impartial verdict upon the evidence as it might come out on the trial, uninfluenced by the rumor which he had heard." The prisoner's counsel insisted that the juror was not indifferent; but the court being of opinion, from the examination of the juror and from his whole demeanor, that he was indifferent, disallowed the challenge and directed him to be tendered, when he was challenged peremptorily by the prisoner. Another juror, named Bryant Dowd, was challenged by the prisoner for the same cause. He stated, on oath, that he had formed and expressed the opinion that the prisoner was guilty, and that he had formed it on information derived from a person who, not long after the occurrence, had been to the place where the homicide was committed, and from information derived from other persons; but that he was satisfied he could give the prisoner a fair and impartial trial, uninfluenced by anything he had heard. He was directed to be tendered, and the prisoner challenged him peremptorily.

When the jury was completed, the prisoner had made twenty- (486) one peremptory challenges.

On the trial, witnesses testified that on 6 August before, a company of soldiers under the command of Lieutenant Mills, an officer of the Confederate States Army, having arrested three deserters, were carrying them from Carthage, in Moore County, to a station on the railroad, whence they might be sent on to the army. While the soldiers were marching along a road, they were shot at by persons about fifteen steps from the road, and John C. Howard, one of the soldiers, was killed. Two volleys were fired in quick succession from the woods through which the road ran. In the first volley eight or ten guns were fired. Immediately after the last volley, one of the soldiers rushed into the woods in the direction from which the guns were fired, and he saw several men running away. He saw the prisoner sitting at the foot of a tree about fifteen steps from the road, in the direction from which the deceased was shot. The prisoner had a gun in his hand, which was empty, and had, apparently, just been discharged. There were signs on the ground and grass of several men having been recently standing close to the tree at the foot of which the prisoner was sitting, in a line parallel to the road; and there were marks of powder on the leaves

about 4 feet from the ground, between the tree and the column of soldiers. None of the persons in the woods were identified except the prisoner.

The counsel for the prisoner contended that he could not be convicted unless the jury were satisfied that the prisoner discharged the gun which caused the death of the deceased, and requested the court so to charge the jury. The court declined to give the instructions asked, and instructed the jury that if they were satisfied from the evidence that the party in the woods fired upon the party in the road; that
(487) the decesed was thereby killed; that the prisoner was one of the party in the woods, and was aiding and abetting the others; then they might convict the prisoner, although the discharge of his gun may not have given the wound of which the deceased died; and even though the prisoner may not have discharged his gun at all; for that in combinations of the kind alleged, the mortal wound, though given by one of the parties only, is considered, in the eye of the law, as given by every individual present, aiding and abetting.

The prisoner's counsel then asked the court to instruct the jury that there was no evidence of any combination between the prisoner and the others in the woods; but the court declined to give the instruction.

There was a verdict of guilty, and from the judgment thereon the prisoner appealed.

Attorney-General for the State.
No counsel for prisoner.

MANLY, J. The exceptions made to the ruling of the judge below on the formation of the jury cannot avail the prisoner.

Both the men, when tendered, were rejected by peremptory challenges.

The challenges of this kind had not been exhausted at the completion of the jury (only 21 having been made), so that no one was upon the jury against the prisoner's will. If, therefore, an error was committed in tendering a man, it did the prisoner no wrong. It is due, however, to state that no error, of which the prisoner can complain, is apparent upon the record. The subject of challenges to jurors underwent in this Court so full an examination in *S. v. Benton*, 19 N. C., 196, and the principles there discussed and announced have been so often reaffirmed and illustrated by subsequent cases that we deem it unnecessary to enter upon it anew. Several of the later cases will be found collected in the note to *Benton's case* (second edition).

(488) The instructions given by the court, on the principal ground of defense taken by the prisoner's counsel, are in strict conformity to law. These principles are of common learning. 1 Hale P. C., 462.

The court was requested to charge the jury that there was no evidence of a combination. This the court declined—and, as we think, properly declined. There was evidence, and abundant evidence, as we think.

We have examined the whole record in this case, and do not find any error.

PER CURIAM. No error.

NOTE.—When one person is present aiding and abetting another in the commission of a crime, both are guilty. *S. v. Merritt*, 61 N. C., 134; *S. v. Rawls*, 65 N. C., 334; *S. v. Hill*, 72 N. C., 345; *S. v. Gaston*, 73 N. C., 93.

It is not a good cause of challenge that the juror has formed and expressed an opinion adverse to the prisoner, such opinion being founded on rumor, and the juror further stating that he could try the case, according to the law and the evidence, uninfluenced by any opinion he may have so formed from such rumor. To disqualify the witness the opinion should have been fully made up and expressed. *S. v. Collins*, 70 N. C., 241. See *Baker v. Harris, ante*, 271.

Cited: *S. v. Holmes*, 63 N. C., 21; *S. v. Hill*, 72 N. C., 349; *Capehart v. Stewart*, 80 N. C., 102; *S. v. Brittain*, 89 N. C., 504; *S. v. Hensley*, 94 N. C., 1029; *S. v. Green*, 95 N. C., 613; *Dunn v. R. R.*, 131 N. C., 447; *S. v. Robertson*, 166 N. C., 362; *Oliphant v. R. R.*, 171 N. C., 304.

THE STATE v. JOHN MEDLIN.

(2 Winst., 99.)

If several armed men go to a dwelling-house in the night-time, for the purpose of seizing the body of the owner, without lawful authority, and one of them be killed by the owner to prevent the execution of their purpose, such killing is not *murder;* it is certainly no more than manslaughter.

INDICTMENT against the prisoner for the murder of one Hosea (489) Little, tried before *Heath, J.*, at Fall Term of MECKLENBURG, 1864.

On the trial one Ringstaff testified that before and at the time of the homicide he was a lieutenant in the army of the Confederate States; and in obedience to a written order directed to him, purporting to be from General G. W. Smith, commander of the department of Henrico, he, in the fall of 1862, came to the counties of Union and Mecklenburg, in this State, for the purpose of arresting deserters and persons absent from their commands without leave, who might be found in those counties; that he has been a prisoner in the hands of the enemy for nine months, and the order was lost or destroyed while he was a prisoner. The counsel for the prisoner objected to the witness speaking of the

order, but the objection was overruled by the court. The witness said that in execution of the order, in September or October, 1862, he summoned the deceased, who was not a soldier, and five other persons, to go with him to the dwelling-house of the prisoner, about 10 or 11 o'clock at night; and he and the men with him disposed themselves so as to surround the house. He and another man went into the porch, where he heard knocking at the door on the opposite side of the house. He then put his eye to a crack in the side of the house, and before he had time to see anything, some one in the house said, "God damn you!" and fired a gun, the ball from which cut his whiskers and knocked splinters in his face. He then said to the deceased, who was standing by, "Open the door, and give me a chance." He does not know what else he said; thinks he might have said, "I will shoot the damned rascal who
(490) shot at me." He had a rifle in his hand with a hair trigger, which went off accidentally at this time. The door was opened afterwards, he did not know by whom, or how; he thinks it was opened from the outside; it was not broken down. He then heard the sound of men's feet running on the other side of the house, and some one say, "Here they go!" He ran around and found his men running off after some one. He heard voices in the house in a low tone, and called to his men to come back, and the deceased and another started back; when they had got within about ten paces of the house, a door opened on the side, on which they were advancing; three men stepped from the house; two guns were fired in quick succession by them, he thinks from a double-barrel gun; the deceased fell, and the man advancing with him was also hit; the three men went off and he fired at them as they ran. One Austin swore that he was one of the men summoned by Lieutenant Ringstaff; when they first went to the house of the prisoner, one of the men named Short went into the porch on the opposite side to where Lieutenant Ringstaff was, and knocked at the door; a female voice within asked, "Who's there?" to which Short answered, "It doesn't matter; I have come here with the proper authority, and intend to come in," to which the female replied, "There is nothing here that belongs to you, and I will not open the door." Short continued to knock, and said: "If you don't open the door, I will break it open." At this time witness looked into the house through a crack, and by a light in the fireplace saw the prisoner advancing toward the fireplace with a gun in his hand, which he fired at Ringstaff.

There was also evidence tending to show that the prisoner was a deserter from the army of the Confederate States, and that he fired the gun which killed the deceased.

The prisoner's counsel contended:

(491) 1. The prisoner did not do the act of shooting.

2. If he did, it was excusable, as it was done in self-defense—defense of the prisoner's dwelling-house; in defense of his person and family, and in prevention of a threatened felony.

The court charged the jury:

1. That if these men banded together as deserters, with a common understanding and determination to stand together and resist all persons who might lawfully come to arrest them, and if the prisoner killed in consequence of this determination, it would be murder.

2. If the prisoner knew he was a deserter, and sought as such by persons having proper authority ot arrest him, and killed to prevent such arrest, it would be murder.

3. If the prisoner believed, and had reason to believe, that a mere trespass only was intended, and killed to prevent such trespass, it would be murder.

4. If the prisoner killed for revenge for anything that had been done to his house, and out of malice, it would be murder.

5. That if the prisoner killed because his house was broken into in the night, he not knowing what was to follow, he would be guilty of nothing; that if the prisoner believed, and had cause to believe, that a known felony was about to be committed on himself, his property, or his family, the parties being in apparent situation to commit said felony, and he killed to prevent it, then he would be guilty of nothing.

The jury found the prisoner guilty, and from judgment according to the verdict, the prisoner appealed.

Attorney-General for the State.
Wilson for prisoner.

PEARSON, C. J. In *S. v. Jarrott,* 23 N. C., 76, this Court, (492) taking the law to be that insolence on the part of a slave to a white man would justify a battery, but not an *excessive* one, awarded a *venire de novo* on the ground that the instruction to the jury must be understood as having reference to the testimony, and was in that sense erroneous; and used these words: "The language of his Honor, indeed, is that 'if the prisoner used the provoking language testified by the witnesses, deceased had a right to *whip* him.' But by the word 'whip' he must necessarily be understood as meaning to 'whip in the manner testified by the witnesses,' that is, with a knife and a fence rail."

In this case we think the prisoner has a right to complain of the third instruction, *i. e.,* "If the prisoner believed, and had reason to believe, that a mere trespass only was intended, and killed to prevent *such trespass,* it would be murder"; for taking the law to be that a mere trespass to personal property does not mitigate where the killing is with a deadly

weapon, but that a violent trespass to the person does mitigate, this instruction must be understood as having reference to the kind of trespass spoken of by the witness, and, in that sense, is erroneous. His Honor having, in the second instruction, presented the case to the jury on the footing of the deceased, and the party to which he belonged, had *proper authority* to arrest the prisoner, in the instruction now under consideration, assumes that the deceased, and the party to which he belonged, were acting *without proper authority,* and that what they did, or intended to do, was *a trespass,* and must necessarily be understood as meaning the kind of trespass testified by the witnesses—that is, going to a man's house in the night-time, with a number of armed men, for the purpose of seizing his body. Killing to prevent a trespass of this nature is certainly no *more* than manslaughter.

It occurred to us that this error might be cured by the fifth instruction. On consideration, we are satisfied that that instruction cannot have this effect, because it is qualified and restricted by the words, "he not knowing what was to follow." On the supposition that he (493) did not know what was to follow—that is, that they intended to arrest and take him off as a deserter—the killing was mitigated, unless they had proper authority to do so, which view is not presented by this instruction, and, consequently, it does not cure the error of the third instruction. The first and second instructions assume that there was proper authority to arrest; the other instructions assume that there was not. The most important question is left undisposed of, and to that omission the want of clearness in the case is to be ascribed.

As is said in *Gaither v. Ferebee, ante,* 303, "His Honor has left the case to the jury in such a manner as to make it impossible for this Court to know what his opinion was on a question of law arising on the facts of the case, and, of course, making it impossible to review his decision" —unless his instructions are considered as mere abstract propositions of law, without reference to what was testified to by the witnesses.

PER CURIAM. Error.

NOTE.—*Vide* note to *S. v. Bryan, ante,* 479; *S. v. Summey, post,* 496.

Cited: S. v. Rogers, 166 N. C., 390.

JOHN R. BRANCH AND BENJAMIN F. GARY, EXECUTORS OF SAMUEL W. BRANCH, v. N. A. H. GODDIN.

(2 Winst., 105.)

1. One who has made a gift of slaves, void by the act of 1806 (Rev. Code, ch. 50, sec. 12), cannot be estopped to assert his title by any act *in pais*.

2. Nor is he estopped by the record of a partition of the slaves by a suit, some of the parties to which, being infants and his wards, sue by him *as their guardian*.

ACTION of detinue for slaves named, etc., and was submitted to (494) the decision of *Saunders, J.*, at HALIFAX Fall Term, 1864, on the following case agreed:

About 1852 Samuel W. Branch, the plaintiff's testator, placed the slaves for which this suit is brought, by parol, in the possession of Edward Tillery, who had married his daughter, Rebecca. They remained in the possession of the said Edward until his death in 1857. The plaintiffs' testator administered on his estate, and returned the said slaves in the inventory thereof, and listed and paid taxes on them as such administrator. At November Term, 1862, of Halifax County Court, Rebecca, widow of the said Edward, and her children, Olivia and Eliza, the latter suing by the plaintiff's testator, who had qualified as their guardian, filed their petition for a division of the slaves belonging to the estate of said Edward, of which they were tenants in common, specifying in said petition the above-mentioned slaves as belonging to said estate. On 28 December, 1862, the said Rebecca intermarried with the defendant, N. A. H. Goddin, and on 29 of said month the said slaves were divided according to a decree made in the said cause at the previous November sessions. In the division the slaves sued for were allotted to the defendant and wife. The proceedings were returned in due form to February sessions, 1863, of said court, and the defendant made a party thereto; the said division was thereupon confirmed and ordered to be recorded. The plaintiff's testator was present at said division, and fully assented thereto. He died in January, 1864, having made and published his last will and testament in writing, of which the plaintiffs are the executors, by which he bequeathed the negroes aforesaid to the sole, separate, and exclusive use of his daughter, Rebecca, during the term of her natural life, and at her death over, etc. But the plaintiff's testator never made any demand for said slaves, nor claimed them in any way, from the time he put them into the possession of his daughter until his death. (495)

The slaves have been in possession of the defendant and claimed by him as his property since the division on 29 December, 1862, and upon demand of the executors therefor, he refused to deliver the same, and thereupon this suit was brought.

In the Superior Court judgment was given for the defendant, from which the plaintiffs appealed.

Moore for plaintiff.

BATTLE, J. In *Alston v. Hamlin,* 19 N. C., 115, it was decided that the act of 1806 (Rev. Code, ch. 50, sec. 12) having been enacted on purpose to exclude all parol evidence of a gift of slaves, necessarily avoids every estoppel by parol which might be set up to defeat its operation. Hence, where the owner of slaves made a parol gift of them to his son-in-law, who bequeathed them to his children, and died, leaving the donor executor of his will and guardian of his children, it was held that the taking possession of the slaves and hiring them out, first as executor and then as guardian, was of no avail to pass the title; and that there was no possession adverse to the donor; and, further, that the statute of limitations did not begin to run against him until he had permitted a division of the slaves among his grandchildren and delivered them over.

The authority of that case has always been acknowledged; and the principle therein established must entitle the present plaintiffs to a judgment on the case agreed, unless the partition of the slaves, made under the decree of the county court of Halifax, shall be deemed sufficient to prevent it. If the plaintiffs' testator had been a party to the suit for partition, then he would have been estopped by the record from (496) setting up any title to the slaves. *Armfield v. Moore,* 44 N. C., 157; *Dixon v. Warters,* 53 N. C., 449. But his being guardian to the infant petitioners in that suit did not make him a party for the purpose of having any adjudication of his rights. It was his duty, as guardian, to protect the rights of his wards (whatever such rights may be) in the suit for partition between them and their mother. Unless the plaintiffs' testator had been made a party, he could not have any opportunity to assert his title in that suit, and hence he cannot be estopped by any order or decree in it. The division of the slaves which was then made, in pursuance of the decree in the cause, and the possession of the parties which followed it, had the effect to put the statute of limitations in operation; and the testator's title would have been barred had not the present suit been commenced within less than three years from that time.

What will be the effect of the record of partition between the parties thereto when the present plaintiffs shall assent to the legacy, is a question not presented to us, and upon which, therefore, we refrain from expressing any opinion.

As the case now stands, we think the judgment given in the court below upon the case agreed is erroneous, and must be reversed, and a judgment be entered for the plaintiffs.

PER CURIAM. Reversed.

NOTE.—No estoppel of record is created against one not a party to the record. *Falls v. Gamble*, 66 N. C., 455. See, also, *Frey v. Ramsour*, 66 N. C., 466; *Mason v. McCormick*, 75 N. C., 263.

Cited: *Falls v. Gamble*, 66 N. C., 465; *George v. High*, 85 N. C., 113; *Weston v. Lumber Co.*, 162 N. C., 193.

THE STATE v. JOHN SUMMEY.

(2 Winst., 108.)

1. A person who leases his still-house and still, knowing that the lessee takes them for the purpose of distilling spirits from corn, which purpose is accomplished by the lease, is not guilty of a violation of the act forbidding the distillation of spirits from corn, if he has not any interest in the liquor made.
2. Liquor obtained by running the beer once through the still is "*spirituous liquor*" within the act.
3. The judge is required to put the case to the jury in such a way as to make it appear by the record what facts the jury find, and what is his opinion as to the law, so that his opinion may be reviewed.

INDICTMENT tried before *Reade, J.*, at Fall Term, 1864, of (497) TRANSYLVANIA.

The indictment charged John Summey, William Summey, and Samuel Johnston with distilling spirituous liquor from corn. Johnston was not taken. The two other defendants appeared and pleaded not guilty.

On the trial, one witness swore that John Summey admitted to him that one Johnston, who lived in South Carolina, had corn which he wished to distill, and the defendant leased to him his still-house and still in Transylvania County for the purpose of distilling his grain, but he, the defendant, had nothing to do with the spirits or profits; and that the defendant further admitted that some of the corn had been distilled, or that was asserted in the defendant's presence, and he did not deny it. Another witness for the State swore that he went to the still and found them distilling; that they had not doubled; they had not run the beer twice through the still, but once; and the liquor so produced is called *singlings*. It is usual to run the singlings through the still a second time to make it stronger.

There was no other evidence.

It was admitted on both sides that the witnesses were entitled to credit. It was contended by the defendant John that he was not guilty, because he did not actually participate in the stilling, and because there was no distillation unless they doubled.

(498) The court charged the jury that if they believed the evidence, the defendant John was guilty.

The jury found the defendant William Summey not guilty, and the defendant John Summey guilty; and from the judgment against him, John Summey appealed.

Attorney-General for the State.
W. H. Bailey for defendant.

PEARSON, C. J. The counsel for the defendant, on the trial below, put the case on two grounds, both of which were presented by the evidence:

1. That he was not guilty, "because he did not actually participate in the stilling."

2. Because "there was no distillation."

His Honor does not respond to either position, directly, but charged, in general terms, that "if the jury believed the evidence, the defendant was guilty."

From this mode of putting the case to the jury there is no telling whether they found the defendant guilty upon the testimony of the first witness or of the second, or of both; for, although both witnesses are admitted to be entitled to credit, it may be that the jury acted on the testimony of the first, not being able to find, from the testimony of the second witness, that the defendant was present, or, if present, that he had anything to do with the stilling, which is a work which may not require more than one hand. If this witness referred to the *three* persons against whom the bill was found, or to the *two* who were on trial, and the jury found on his testimony, it cannot be understood why they acquitted *William Summey.* Or it may be that the jury acted on the testimony of the second witness, supposing the first might be mistaken in regard to the conversation which he had heard. In this state of the case it follows

(499) that the defendant is entitled to a *venire de novo,* if the point made upon the testimony of *either* of the witnesses ought to have been ruled in his favor. For we are obliged to suppose that his Honor overruled both positions, or impute to him a want of candor, by which the jury were left in the dark as to his opinion on the questions of law, and this Court would not be able to review it.

When counsel make a point which arises on the evidence, and expressly, or by implication as in this case, request the opinion of the

judge, and he declines to give it, or fails to do so by a general charge like the one under consideration, it is error, notwithstanding there is another view of the case arising on other parts of the evidence which is against the party. The statute requires a judge to "state to the jury, in a full and correct manner, the evidence given in the case, and to *declare* and *explain* the law arising thereon." He is not required to recapitulate the evidence in detail—but he *is* required to put the case to the jury in such a way as to make it appear by the record what facts the jury find and what is his opinion as to the law, so that his opinion may be reviewed by this Court.

A general charge is only allowable in special cases, when these purposes are otherwise fully answered. *Gaither v. Ferebee, ante,* 303; *S. v. Norton, ante,* 296. These cases dispose of the subject. They were decided at June term last, and we presume his Honor had not read them.

This Court is of opinion that in order to justify a conviction under the statute, it must be proved that the party either distilled grain himself or *procured* it to be done; and that the fact that the defendant "leased or hired" his still-house and still to one who had corn, for the purpose of distilling the corn, and that it was in fact distilled by him at the house and in the still, *the defendant having no interest in the spirits,* does not make him guilty of a violation of the statute.

Upon the second point, the Court is of opinion that to run beer, (500) made of corn, through the process of distillation once is a violation of the statute; for spirituous liquor is thereby distilled out of corn; and although the liquor is improved by running it through twice, that is not necessary in order to make it "spirituous liquor" within the meaning of the statute.

PER CURIAM. *Venire de novo.*

Cited: S. v. Ellick, ante, 457; *S. v. Jones,* 87 N. C., 556; *S. v. Kennedy,* 89 N. C., 590.

SETH BRIDGMAN v. PETER MALLETT.

(2 Winst., 112.)

The appointment to an office, under the State Government, of a citizen of the State who is in the service of the Confederate Government is void unless, *perhaps,* the office be one recognized by the *Constitution* of the State as essential to its government.

CERTIORARI at the suit of Major Mallett, for the purpose of reviewing the decision of *Battle, J.,* in a writ of *habeas corpus* sued by the plaintiff against the defendant as commandant of conscripts in this State.

Judge Battle, on the trial before him, ordered the petitioner to be discharged, on the authority of *In re Russell, ante,* 388.

The facts of the case are stated in the opinion of *Judge Battle.*

Busbee for petitioner.
Bragg for defendant.

BATTLE, J. The petitioner was, prior to 26 April, 1864, a lieutenant in the Army of the Confederate States; but by an order of that date he was dropped from the roll as an officer. At the August Term,
(501) 1864, of the Court of Pleas and Quarter Sessions for the county of Hyde, he was elected register of deeds of the county, and was duly qualified as such by entering into bond and taking the necessary oaths. Subsequently, to wit, on 22 September, 1864, he was ordered as a conscript by the enrolling officer of the county, to report himself without delay to the camp of instruction, near Raleigh. The date of enrollment is not distinctly specified either in the petition or return, though it is strongly to be inferred from the allegations of the petitioner that it was prior to his election as register. That, however, I consider as immaterial, because I think that under the army regulations he was in the military service as a private as soon as he was dropped from the roll as an officer. See Army Regulations.

It is agreed by the counsel that a register of deeds of a county is a civil officer of the State, and that the Governor had claimed the petitioner as an exempt from military service in the Army of the Confederate States.

Upon this statement of facts, it is contended by the counsel for the petitioner, first, that he is entitled to a discharge from custody, upon a just construction of the second paragraph of section 10 of the act of Congress ratified on 17 February, 1864, though he was in the military service when he was elected register of deeds of Hyde County. Secondly, if that be so, that after his election and qualification as a civil officer of the State, he became exempt from any further service in the army of the Confederate States, because Congress has no power to restrict the State in the selection of any of its citizens, whether in or out of the army, to fill any office necessary to the action of the Government. I differ from the counsel as to the correctness of his position, and will proceed to state, as well as I can, the reasons upon which my opinion is founded:
(502) 1. In ascertaining and settling the construction of the military act of February, 1864, it is proper to avail ourselves of any light which may be thrown upon the subject by any statute *in pari materia*, particularly if it were passed about the same time. 1 Bl. Com., 60.

It appears from the act of Congress approved 5 January, 1864, entitled "An act to put an end to the exemption from military service of

those who have heretofore furnished substitutes," that the country was then in very great need of soldiers. The preamble recites that, "Whereas, in the present circumstances of the country, it requires the aid of all who are able to bear arms, the Congress of the Confederate States do enact," etc. This most pressing want of the Confederate Government is, if possible, still more strongly shown in the act under consideration. It repeals all former laws which granted exemptions, and thus at once sweeps away the long list of exempts which may be found in the act of October, 1862. It enlarges the ages of conscripts from 18 and 45 to 17 and 50, thus calling into the field of active service boys and old men. It takes from their homes almost every person capable of bearing arms, except those officers who are necessary to the proper administration of the Confederate and State governments, and a few others who were deemed necessary to carry on the educational, industrial, and other indispensable pursuits of the country, with the addition of a still fewer number who are restrained from bearing arms by religious scruples. With this most urgent, pressing demand for soldiers for the defense of the country in its life and death struggle for National existence, placed thus prominently before us, have we a right to infer that Congress intended, by the exemptions which it granted in the act of February, 1864, to release from further service in the army any soldier whom it had a right to retain there? It seems to me to be ignoring the whole spirit of the act to suppose so. I cannot come to any such conclusion unless I find it so declared by the express terms of the act.

So far from finding any express declaration in the act to that (503) effect, the terms of exemption may be fully satisfied by confining them to the persons filling offices, occupying positions, or engaged in pursuits at the time of their enrollment. In some cases the persons exempted must have been employed in the duties of their office or profession at the date of the act, and could not entitle themselves to an exemption by subsequently engaging in such office or profession, even prior to the time of their enrollment. This is the case with regard to ministers of religion, physicians, and schoolmasters.

All the farmers of the country are put into the army, except the bonded overseers of fifteen able-bodied field hands, and even they, it seems, might have been deprived of the benefit of this exemption had they been enrolled since 1 February, 1864, but for a special provision in their favor. See paragraph 4 of section 10 of the act of February, 1864. Looking, then, over the whole act, from the first section to the last, I am unable to discover anything, either in its language or spirit, which releases or exempts from service any person already in the army as a soldier. The fact that, by another act of Congress, officers and soldiers in the army may become exempt from further service by being elected to

certain offices or places of trust, either in the State or Confederate Government, does not affect the present case, which depends, in the view in which I am now looking at it, entirely upon the construction of the act of February, 1864.

2. The second position taken for the petitioner by his counsel is a much more important one, affecting as it does the relative powers and rights of the Confederate and State governments; and I, therefore, approach its discussion with much diffidence, particularly as I find that the conclusion at which I have arrived is at variance with the (504) opinion entertained by many for whose learning and ability I entertain the highest respect. The difficulties of the case arise from the fact that the same persons are citizens of two separate and distinct sovereigns, to both of which they owe duty and allegiance. If the constitutions upon which their respective governments are based be rightly construed, and rigidly adhered to, there will be little or no danger of their clashing or interfering with each other in their respective demands of service from the people. In the distribution of the powers of sovereignty it is conceded that the States have conferred upon the Confederate Government the war power; that is, the power to declare war and to raise and support armies. It has been held by all the greatest statesmen and judges of the country that this power is, with a slight exception, unlimited. In aid of this and the other powers vested in the General Government, the Constitution declares that Congress shall have power "to make all laws which shall be necessary and proper" for carrying them into execution. See Art. I, sec. 8, par. 18. And it asserts the supremacy of the Confederate States, as to the powers conferred upon the Government, by declaring that "this Constitution, and the laws of the Confederate States made in pursuance thereof, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary, notwithstanding." Although the war power of the Confederate Government is thus absolute and unlimited in terms, and the supremacy of that Government over the States, with regard to that power, is thus clearly and distinctly asserted, it has been decided, and I think rightly decided, that the Confederate Government cannot, in the exercise of the war power, destroy the States, by conscribing those officers who are necessary to the action of the State governments. See *Burroughs v. Peyton,* 16 Gratt., 470, decided by the Supreme Court of Appeals of Vir- (505) ginia, and recognized as authority in *Johnson v. Mallett, ante,* 410, decided by this Court. Whatever persons filled any office in the State which the Legislature declared to be necessary for the State Government when the act of February, 1864, was passed, were thereby placed beyond the power of conscription by the Confederate Govern-

ment. That government is founded upon the State governments as sovereigns, and cannot exist without them. The superstructure must fall when its pillars are taken away or destroyed.

But the case is reversed when the Confederate Government has, in the exercise of its rightful supreme war power, conscribed into its service a man who is not an officer of the State, and the State is attempting to take him out of it by electing him to an office. The man, as a citizen, owed the duty to the General Government which it had called upon him to perform, just as much as he owed the duty to the State to accept and discharge the duties to which he was elected. Here are two obligations undoubtedly binding upon the man, but which, being inconsistent, cannot both be performed at the same time. How can this conflict be settled but by resorting to a principle of potent efficacy both in international and municipal law, that priority of possession gives priority of right? This would seem to be a just rule, even if the two governments were equal in their powers with respect to the subject; and it surely cannot operate against that government whose power in that particular is supreme.

The State must, in such a case, yield to the prior claim of the General Government, and select some other man to fill its office. The argument, that perhaps the State cannot find another person out of the army fit for the place, is answered by the equally probable supposition, that the General Government may not be able to procure another fit person for a soldier. When either supposition shall become certainty, it will be when both governments are on the eve of destruction.

The petitioner, in the present case, is not one of the officers of (506) the State who is recognized in its Constitution as being essential to the Government. If he were so, the argument in his favor would be much stronger, perhaps irresistible. The Constitution declares, in express or necessarily implied terms, that there shall be a Governor, judges of the Supreme Court, justices of the peace, a sheriff, a coroner or coroners, and constables in each county; a Secretary of State and several other officers; also members of both houses of the General Assembly; and it may be that with regard to all these the State never surrendered the right to have the offices and places filled by any of her citizens, whether they should be at the time of their election in the service of the General Government or not. This is a question of the highest importance to both governments, and I will not undertake to decide upon it until it becomes necessary, in the performance of my judicial duty, to do so. It may also deserve more consideration than the subject has yet received, whether the Legislature can deprive the State of any of these

constitutional officers by permitting them to be conscribed, as it purports to do as to some of them, by the act of 14 December, 1863. See laws of the extra session in December, 1863, ch. 14.

My conclusion, upon a full consideration of the whole matter, is that the judgment which I rendered in vacation, in favor of the petitioner, founded, as I expressed at the time, upon the previous case of *In re Russell, ante,* 388, decided by the Chief Justice, was erroneous, and ought to be reversed, with costs, and that the petitioner must be remanded to the custody of Major Peter Mallett, commandant of conscripts.

MANLY, J., concurred.

(507) PEARSON, C. J., dissenting: It is a matter of regret that the judges of this Court have not been able to agree upon all of the questions to which the general conscription act, 17 February, 1864, has given rise. But the ground was untrodden. There was no case to guide us, and perfect concurrence of opinion was hardly to be expected.

So far as the opinion delivered by my brother *Battle* is based on the doctrine of necessity, *"which knows no law,"* and the principle that, in respect to *individuals,* the war power of Congress is unlimited—those questions being settled by *Gatlin v. Walton, ante,* 325, it is my duty to conform to that decision.

That case did not present the question whether the war power of Congress is also unlimited in respect *to the States,* which is "the point" in this case.

Johnson v. Mallett, ante, 410, at the extra term, settles the principle that, in respect *to the States,* the war power of Congress is limited, and is subject to their reserved right in regard to their officers; and on that ground it is decided that a State officer is not liable to conscription.

It is conceded that this right cannot be impaired by the action of Congress, and the difference of opinion is as to the *extent* of the right. Is it confined to *the keeping* in offices persons who may be in office at a given time? or does it extend to *the filling of vacancies* which from time to time may occur? That is the question.

The ground on which this right is based is that the existence of a State depends on having such officers as are necessary to administer its government and laws. Therefore it cannot be intended that in creating the government of the Confederate States it was the design of the States to confer a power by which their existence would be made to depend on the will of their creature.

This is a broad ground, and it embraces as well the right to fill (508) vacancies as the right to keep in office persons who may be in

office at a given time; for the former right is equally as necessary to the continued existence of a State as the latter; and no State can have an independent existence without both. In fact, they are but *parts of one and the same right.* This being so, it follows that neither part can be impaired by the action of Congress; and it must be conceded that the part in relation to filling vacancies is decidedly impaired if it be restricted to the election or appointment of men who are over conscript age, exempt as a "matter of grace" on the part of Congress.

Both being necessary, and covered by the same principle, I can see no ground to draw a dividing line between the two parts, except to "split the difference" between the claim of the Confederate States and the reserved rights of the States because of a "present necessity," on the idea of "letting the future take care of itself."

To meet this difficulty, a distinction is suggested between the offices named in the Constitution and offices created by the Legislature. This suggestion does not meet the difficulty. It was not to be expected that an instrument like the Constitution would enumerate all of the necessary State offices, and, therefore, it confers on the Legislature power to create and fill all offices which, in its wisdom, should be deemed necsesary; and there can be no substantial difference between offices *named* in the Constitution and offices *created under its authority,* both classes of offices being necessary for the proper administration of the government and laws of a State—in other words, to preserve its existence; and the power conferred on Congress is subject to the rights of the State in regard to both classes. Indeed, it is decided by *Johnson v. Mallett, supra,* that the part of the right in relation to keeping persons in office embraces offices of the latter class as well as offices of the former class; so the only question "open" is as to that part of the right in relation to filling vacancies. This suggestion, so far from disproving that part of the right, yields a part of the question and makes it more difficult (509) to maintain the other. To make the subject clear, take an illustration from the operations of war, that being the order of the day: The main work in front is carried by *Johnson v. Mallett, supra;* the work on the right is yielded by this suggestion, whereby the work on the left becomes so exposed in front and flank as to be no longer tenable.

Again, it is suggested: "The two governments should act in harmony, and to do so, the government which first exercises a power ought to be allowed to retain all citizens who have been taken into its service." No one feels a deeper conviction than I do that in order to preserve harmony, each government should be allowed the fullest exercise of its *rightful* powers. But the suggestion under consideration interferes with the exercise of a rightful power of the State, and assumes the powers of the two governments in regard to this subject to be *concurrent.* This is

a departure from the principle settled in *Johnson v. Mallett,* to wit, that the war power of the Confederate States is subservient to the reserved right of the States in regard to their officers. In my opinion, the proper way to preserve harmony and allow "each to move in its appropriate sphere" is to consider Congress as having exercised its powers of conscription, *subject to the preferred right* of the States; so that, when it becomes necessary for a State to exercise the preferred right, the prior action of Congress shall give way and allow the election of a State officer to fill a vacancy, to have the effect *ipso facto* of terminaitng the conscription of the person elected; in the same way, and on the same ground, that one in the militia or home guard service of a State, as soon as he is conscripted, passes into the service of the Confederate States, because the war power of the State is secondary, and the Confederate States have the preferred right under their war power. (See my opinion, *Wood v. Bradshaw, ante,* 419. The principle may be illus-
(510) trated by many analogies of the law. One will suffice: A sister takes as heir of her brother; afterwards another brother is born. At the common law the estate of the sister terminates, and gives place to the right of the brother, under the rule, "males are prefered to females."

The other point, as to the meaning of the act, section 10, clause 2, is of minor importance. But I am so unfortunate as to differ in respect to that also. I can see nothing in this clause to confine its operation to persons who, at the date of the act, filled the offices of Vice President, members of Congress, members of the Legislature, and other Confederate and State offices, and to exclude from its operation all persons who may afterwards be elected to these offices, *if they are at the time of their election in the military service of the Confederate States.* The conscription, by the act, February, 1864, is general, and applies as well to persons then in service, to keep them in during the war, as to persons not then in service. The exemption must have as broad an application as the conscription, unless there be words of restriction. The only words used are, "shall be exempted," which means "shall be relieved" from the service imposed by the conscription. Such being the plain meaning of the words used, it must be taken that Congress so intended, and there is no room for construction.

If words at all ambiguous had been used, the rule of construction, that the Court may derive aid from other statutes *in pari materia,* or from the *preamble* to a former statute made for the special purpose of justifying an act which, to many, seemed to be in violation of a contract, might have been applicable; and, on the other hand, it might have been relevant to have made the suggestions: that the exemption in regard to State officers was meant to extend to persons in the army, elected

to fill vacancies, in deference to the right claimed by the State; (511) that it is unreasonable to suppose it was intended to confine the States, in filling all vacancies that might thereafter occur, to the election or appointment of men over conscript age; and that in regard to members of Congress and other Confederate officers, it would be indecent to suppose that the members *in* at the date of the act intended to exclude from competition with themselves, at future elections for Congress, all of their fellow-citizens except men over the age of 50 years.

In my opinion, there is no error in the judgment at chambers.

PER CURIAM. Judgment reversed with costs. Petitioner remanded to the custody of Mallett.

NOTE.—*Vide Sowers' case, ante,* 384; *Smith v. Prior, ante,* 417, overruling *Russell's case, ante,* 388.

Cited: Johnson v. Mallett, post, 514.

MATTHEW JOHNSON v. PETER MALLETT.

(2 Winst., 135.)

One who has been enrolled as a conscript is not exempted from military service under the act of 17 February, 1864, by becoming the driver of a mail coach.

CERTIORARI for the purpose of reviewing the judgment of the *Chief Justice* in a writ of *habeas corpus* sued out by Matthew Johnson and returned before him. The *Chief Justice* discharged the petitioner.

The facts of the case are stated in the opinion of the Court.

Mason for petitioner.
Bragg for defendant. (512)

BATTLE, J. Upon the facts agreed it appears that the petitioner had been enrolled as a private soldier under the act of Congress, ratified 17 February, 1864, prior to the time when he became a driver of the mail stage from Morrisville to Pittsboro. The question, then, is whether a mail contractor or driver of a post coach can claim exemption from military service, under the act of 14 April, 1863, by having become such after his enrollment as a soldier. The question arises under the last mentioned act, because the act of February, 1864, expressly declares that nothing therein contained shall be construed as a repeal of it. Mail contractors and stage drivers were not mentioned among the classes of

exempts contained in the act of 11 October, 1862, and the act of April, 1863, was passed, no doubt, to supply the omission. The act is in the following words:

"The Congress of the Confederate States of America do enact, That the contractors for carrying the mails of the Confederate States shall be exempt from the performance of military duty in the armies of the Confederate States from and after the passage of this act, during the time they are such contractors: *Provided,*" etc.

Section 2: "That drivers of post coaches and hacks for carrying the mails, on all routes where the weight of the mail requires that they should be carried in coaches or hacks, shall be exempt from military service in the armies of the Confederate States from and after the passage of this act, so long as they continue to be so employed as drivers: *Provided,*" etc.

For the petitioner it is contended that the terms of this act are broad enough to embrace his case, whether he was in the army or out of it at the time of his becoming the driver of a stage coach, and a decision made by *Judge Haliburton,* of the District Court of the Confederate States, in Virginia, is relied upon in support of it. On the other hand, it is insisted by the counsel for the defendant that the act in question was never intended to allow a soldier in service to exempt himself therefrom by taking a mail contract, or being employed as a driver, and he (513) relies upon the decision to that effect made by *Judge Joynes,* of the Circuit Court of Petersburg, in Virginia. Adjudications made in this State were also referred to by the counsel on both sides.

In this conflict of judicial authority, I feel myself at liberty to adopt the strong convictions of my own mind as to what is the true construction of the act. All the acts of Congress called the conscription acts are, it must be confessed, strong war measures. They can only be sustained, in point of authority, upon the unlimited power vested in the Confederate Government to declare war and to raise and support armies; and in point of policy they can only be justified upon the pressing exigencies of the country, struggling for National existence, with an enemy of vastly greater resources in all the means and appliances of war. It was with a full knowledge of this condition of the country that the conscription acts of April and September, 1862, and the exemption act of October, 1862, as well as the one now under consideration, of April, 1863, were passed. The manifest object of the conscription acts was to call into the military service of the Government as many persons as possible, without interfering with the necessary industrial, educational, and other great interests of the country; and in favor of those interests the exemptions were granted. In making those exemptions, I cannot discover in

the acts any spirit to extend them beyond the purpose for which they were allowed. Persons engaged in certain pursuits or occupations when the acts were passed were not to be enrolled for military service; but there is no indication of an intention strong enough to show that if they were in the army, they were to be permitted to take themselves out of it. It is true, as *Judge Haliburton* says, that the words of the act exempting mail contractors and post coach drivers are broad enough to embrace persons in the military service; but that, I do not think, is (514) the question. The true inquiry is, What did the lawmakers mean? Did Congress intend to let any person out of the army to perform a duty which could be performed quite as well by another person, though not quite so cheaply, while it was resorting to the extremest measures to bring men into it? It must be admitted that the terms of the act may be satisfied by applying them solely to persons not enrolled for service when they become mail contractors or mail stage drivers, and that construction must be adopted whenever we are satisfied that such was the intention of Congress. In *Bridgman v. Mallett, ante,* 500, I have stated the reasons which have led me to adopt that construction as the proper one, upon the act of 17 February, 1864, and I think they apply with very nearly as much force to the other conscription and their attendant exemption acts.

My opinion is, therefore, that the order, made in vacation to discharge the petitioner, must be reversed with costs, and that he should be remanded to the custody of the defendant.

PER CURIAM. Order reversed, and the petitioner remanded to the custody of the defendant.

NOTE.—*Vide Sowers' case, ante,* 384.

Cited: S. v. Harrell, 107 N. C., 943.

DAVID L. BRINGLE v. JOHN A. BRADSHAW.

(2 Winst., 129.)

A contractor to carry the mail is a civil officer of the Confederate Government, and, therefore, exempted from service in the Home Guard by the act of the General Assembly at the session of July, 1863, ch. 10.

CERTIORARI at the suit of John A. Bradshaw, to bring into this Court for review the judgment of *Heath, J.,* in a writ of *habeas corpus* sued out by David L. Bringle against John A. Bradshaw, an officer of the Home Guard. (515)

The facts are stated in the opinion of the Court.
Judge Heath discharged the petitioner from custody.

Blackmer for Bringle.

BATTLE, J. The petitioner, who would be otherwise liable to perform military service in the Home Guard of the State, claims an exemption therefrom on the ground that he is a contractor with the Confederate Government to carry the mail over a route more than 10 miles long, in the county of Cabarrus.

It is contended for him, first, that he is an officer of the Confederate Government, and is, as such, expressly exempted in the act of the called session of the Legislature in July, 1863, ch. 10, "An act in relation to the Militia and a Guard for Home Defense"; secondly, that if not an officer, in the sense of that act, yet he has imposed upon him, by his contract with the Confederate Government, important public duties which require his personal attention, and which are incompatible with the duty of military service in the Home Guard.

The act establishing a Guard for Home Defense, in the second section, exempts, among other persons, "the civil and military officers of the Confederate Government," and the point raised upon the first ground taken for the petitioner is that he is a civil officer of that government. What is an office? It is said to be a place "where one man hath to do with another's affairs against his will and without his leave; and he who is in it is an officer. There is a difference between an office and an employment; every office is an employment; but there are employments which do not come under the denomination of offices." 7 Bac. Abr., 279, Offices and Officers, Letter A. "Offices are distinguished into those
(516) which are of a public and those which are of a private nature; and herein it is said that every man is a public officer who hath any duty concerning the public; and he is not the less a public officer where his authority is confined to narrow limits, because it is the duty of his office, and the nature of his duty, which makes him a public officer, and not the extent of his authority. *Id.,* 280.

Taking this definition of offices and officers to be correct, the duty which is devolved upon a contractor to carry the mail must constitute him a civil officer of the Confederate States. He assumes the performance of certain services under the authority of the Confederate Government, and has the exclusive right to perform them, and to receive the compensation provided therefor. These services are of a public nature, and though the authority of the contractor may be confined to narrow limits, yet the services are of great importance to the public. He is, therefore, within the express terms of the exemption contained in the act

concerning the Home Guards. We are, therefore, unable to perceive any error in the judgment of discharge granted to the petitioner, by his Honor, *Judge Heath;* and it must be affirmed with costs.

NOTE.—*Sowers' case, ante,* 384.

JOSEPH J. COX v. JOHN H. GEE.

(2 Winst., 131.)

1. A soldier actually and rightfully in the army can have no relief by the writ of *habeas corpus* against any alleged abuse of military authority.

2. If he be *wrongfully* held as a soldier, he is not entitled to a *habeas corpus* while he is undergoing punishment or awaiting trial for a military offense.

CERTIORARI at the suit of Joseph J. Cox, directed to *Heath, J.,* (517) for the purpose of reviewing his judgment in a writ of *habeas corpus,* at the suit of Cox against Major Gee, commandant of the military post at Salisbury. The petition alleged that Cox was detained in prison wrongfully and without any cause. The return of Major Gee stated in substance that Cox was a soldier in the Army of the Confederate States, and that he was held in close prison by order of the Secretary of War, on charges of murder and larceny, awaiting his trial by a military court.

Judge Heath dismissed the writ and remanded Cox.

W. H. Bailey for petitioner.
Bragg for Major Gee.

MANLY, J. We concur in the judgment pronounced by his Honor, *Judge Heath,* in this case, and for the reasons stated by him.

With respect to the facts, there is no controversy. The petitioner is a soldier in the Army of the Confederate States. About 1 November charges were preferred against him from some source, entitled, as we presume, to credit, as they invoked the action of his superior officers; and he was put under arrest and sent, for safe keeping, to the military prison in Salisbury, where, soon after his arrival, on 26 November, he sued out a writ of *habeas corpus.*

We are at a loss to conceive any ground upon which the application can be based, even with plausibility. A soldier, bound to service in the army, when once enrolled and assigned his post of duty, is in military

custody, and no longer at liberty to go about at will. His greatest freedom from restraint allows him only to move about within certain limits in the camp. For misconduct he may be put under arrest and confined to narrower limits or condemned to close confinement. And, I (518) take it, in any of these positions he is equally out of the reach of enlargement through civil tribunals until, at least, his term of enlistment expires.

It would indeed be a prolific source of jurisdiction for our judges if they could, or are bound to, carry the writ of *habes corpus* into the camp, the guardhouse, and the military prison, and inquire into the legality of the restraints there enforced.

Such an interference with the discipline of the army, if practicable, would utterly disorganize it.

Legitimate inquiry in such cases goes only to the extent of ascertaining whether the prisoner is rightfully in the army. If so, the civil tribunals leave him to the military, to be dealt with according to their rules and regulations. All the cases which have been before our judiciary have had for their object simply to inquire whether the petitioners were rightfully claimed as soldiers. We have no precedent, therefore, for proceeding with any such object as the one before us.

Supposing the petitioner to have ground for questioning the right to detain him as a soldier, he cannot be heard to do so now. Having waived his right until he is under arrest for offense, he cannot escape consequences by showing on a writ of *habeas corpus* that he was not bound to be there. This is laid down in *Graham's case,* in the Appendix to 53 N. C., at page 416.

But our case is of a soldier admitted to be in the service, and, therefore, with no claim to get out of it or be released from it. He has fallen under censure; he has been imprisoned subject to charges; and from this he desires to be relieved. How, and to what end? We cannot set him at large, we cannot hasten the action of the military tribunals, and it would be an unheard-of novelty to order him from the guardhouse to some position in the ranks of the army. Such a power involves again a troublesome and mischievous jurisdiction.

(519) Arrests in the army are made, as we suppose, by orders from headquarters, verbal or written. There is no affidavit and no warrant, other than the order. The person is detained in such way as may be necessary to keep him safely until a court-martial can be organized for trying him. He may be removed from one place to another, at the will of the military authority, and all this, we are bound to suppose, is in accordance with army regulations. We have no power to interfere for any purpose that we are aware of.

We affirm the judgment of the court below, and order the petitioner to be and remain in custody as before. Petitioner is also ordered to pay the costs.

NOTE.—*Vide Wyrick's case, ante,* 375.

Cited: S. v. Harrell, 107 N. C., 943.

MILES GOODSON v. J. D. CALDWELL.

(2 Winst., 135.)

A man who was between the ages of 18 and 45 at the date of the passage of the act of 17 February, 1864, and arrives at the age of 45 before he is enrolled, is exempt from service for the war, but is liable to serve in the Senior Reserves.

HABEAS CORPUS, returnable before *Shipp, J.,* and by him adjourned into the Supreme Court.

The facts are stated in the opinion of the Court.

Bynum for petitioner.
Bragg for Caldwell.

MANLY, J. Previous to the act of 17 February, 1864, entitled "An act to organize forces to serve for the war," the petitioner was exempt by reason of his being a blacksmith. This exemption being repealed by that act, he became liable to military duty, but was not enrolled until 2 October. In the meanwhile—that is, between the passage of the act and the enrollment—he reached the age of 45 years. The enrollment and arrest are for duty in the army generally, and not as a (520) senior reserve.

We have had occasion at this term to declare in several cases (as in that of *Upchurch v. Scott,* next case) that the act of 17 February does not, of itself, operate as an enrollment, something more being required to put a citizen in military service. This being so, it follows that if the citizen, at the time he is called for, be not liable to perform the service required, he cannot be rightfully enrolled and made to serve.

The act of Congress divides the army into three parts: (1) The junior reserves, between the ages of 17 and 18; (2) The great body of the army, between 18 and 45, as organized under the acts of 1862; and (3) The senior reserves, between the ages of 45 and 50. Had the petitioner been incorporated into the army by enrollment, and ordered into camp, when between the ages of 18 and 45, he would have been rightfully put in the

second division mentioned above, and would have been in for the full term prescribed by the act of 1862. But inasmuch as he was not called for until after he had passed the terminus (45) of that division, he ought to have been enrolled in the third.

He is entitled to relief, therefore, from his present custody, and will stand subject to duty in the corps of senior reserves.

He is discharged accordingly, the officer to pay costs.

NOTE.—*Vide Haswell v. Mallett, ante,* 432.

WILLIAM G. UPCHURCH v. S. W. SCOTT.

(2 Winst., 137.)

A man between the ages of 17 and 50 is exempt from military service under the act of Congress of 17 February, 1864, by becoming the employee of the editor of a newspaper at any time before enrollment.

(521) CERTIORARI at the suit of S. W. Scott, a captain in the militia, directed to *Chief Justice Pearson,* commanding him to certify the proceedings had before him, and his judgment, in a writ of *habeas corpus* at the suit of the plaintiff against the defendant, tried by him in vacation. He had adjudged that the petitioner was unlawfully in custody, and had discharged him.

The facts of the case are stated in the opinion of the Court.

Bragg for Scott.
Mason for Upchurch.

MANLY, J. The facts as they appear upon the record returned into this Court are that the petitioner, in the beginning, furnished a substitute under the act of April, 1862. After the passage of the act of 5 January, 1864, declaring persons no longer exempt by reason of having furnished substitutes, he became again liable to military service. He was not, however, enrolled or ordered into camp until 3 May, 1864. In the meanwhile he had made an engagement with the editor of a long established paper in the city of Raleigh, and actually entered into his service on 2 May, 1864. The editor has made a certificate, under oath, that petitioner is a necessary employee in his office, as prescribed by the act of 17 February.

The question is, whether he be exempt.

The difficulty seems to arise from what we consider a misapprehension of the true and proper effect of the act of 17 February, 1864, ch. 65.

Although, in respect to age, it fixes the *"status"* of every citizen at its passage, as liable or not liable to serve for the war, as they might be within or without the ages prescribed, yet it is not *per se* an enrollment or mustering into service so as to withdraw men from their pursuits and deprive them of the liberty of engaging in or changing them at pleasure, although these pursuits might operate as an exemption (522) from military duty.

We can perceive nothing in the policy or language of this law to prevent a citizen after its enactment, though subject under it to military duty, from accepting an office, or from engaging in any occupation which interest or inclination might suggest, provided it were done before he was actually called into service by enrollment. Up to that time the State had a right to the service of its citizens, and they had a personal liberty to engage in whatsoever business they might think proper. We are citizens of the State and also of the Confederate States. We owe duties to each; and if these duties are inconsistent, both cannot be performed. There is no principle by which such a conflict can be settled but that of the maxim, *"prior est in tempore, potoir est in jure."* If one Government has appropriated a person to its service, by inducting him, in the way known to the law, into a place of duty, the other must yield its claim. The language of the act is, "From and after the passage of this act all white men, residents of the Confederate States, between the ages of 17 and 50, shall be in the military service of the Confederate States for the war." The terms are admitted to be comprehensive; but they must, we think, be interpreted in the modified sense of declaring simply, all persons within teh ages to be subject to duty when called on. Such seems to be the sense in which the Government itself has undertood them; for it has put into action the official machinery necessary for actually enrolling and bringing into camp, and has not regarded the men as subject to military law until so brought in.

We make no question, because it seems to us plain, that the exemption granted by the act to necessary employees in newspaper establishments was intended to apply not only to such as were employed at the time of the passage of the act, but to such as might be introduced in their stead, or become necessary from time to time in the development (523) of the business.

It will then be seen that, although the petitioner was liable, under the act of Congress, to be called at any time into active service, yet, inasmuch as he was not so called and ordered into camp until after he had become an employee in the publication of the newspaper, certified to be necessary, he is exempt by virtue of the same act of 17 February. There is

but a narrow space of time between the employment and the enrollment. It is nevertheless sufficient to mark his case, and to distinguish it from a case of liability to enrollment and consequent liability to duty.

The judgment at chambers is affirmed, and the prisoner discharged; the costs to be paid by the officer, Scott.

Cited: *Smith v. Prior, ante,* 418; *S. v. Harrell,* 107 N. C., 943.

APPENDIX

DECISIONS OF JUDGES IN VACATION

ON

WRITS OF HABEAS CORPUS

In the Matter of CAIN.

(2 Winst., 142.)

The act of Congress suspending the writ of *habeas corpus* held applicable constitutionally only to cases where the person seeking the writ stands committed for crime.

Pearson, C. J. The petitioner alleges he has put in a substitute for the war and is not liable to conscription, but was arrested and detained as a conscript by the enrolling officer, and prays for a special writ to the sheriff to take his body and have it on the return, and to summon the enrolling officer to show the cause of his arrest and detention, under the act of the Legislature, 1862, ch. 46, on the averment that adequate relief may not be afforded by directing the writ to the enrolling officer, for he believes the officer will not return his body.

If the act of Congress suspending the privilege of the writ of *habeas corpus* embraces the case, and if Congress has power to suspend the writ in such cases, the petitioner is not entitled to the special writ, as it would be doing indirectly what cannot be done directly; otherwise he is, for unless the body be returned, adequate relief cannot be given; (526) so that is the question; and as it is new, I directed notice of the application to be given to the enrolling officer and requested an argument.

It was insisted by Mr. Furches, on the part of the petitioner, that the act of Congress only applies to the case of persons *lawfully* arrested and afterwards detained as prisoners by a *special* order of the President or Secretary of War. The effect being simply to deprive persons detained as prisoner, under such circumstances, of the privilege of the writ whereby to be discharged, if a probable cause is not shown, or admitted to bail if the offense be a bailable one, and to enable the President or Secretary of War to have them detained as prisoners without further

inquiry on the part of the Judiciary until the case is tried; and that the suspension does not have the effect of enabling the President or Secretary of War to cause citizens to be arrested *illegally,* as by general order, or by military officers, or to delay the trial. In support of this position he relied on this clause of the Constitution: "The right of the people to be secure in their persons, etc., against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized," as qualifying and restricting the power to suspend the privilege of the writ of *habeas cropus;* so that Congress has not the power to authorize the President or Secretary of War to issue a general order to military or other officers to arrest and detain, as prisoners, any persons who may be charged or be suspected, by these *subordinate ministerial officers,* to be guilty of any of the offenses specified, or even a special order for the arrest of any particular individual, but that the arrest must be made under a warrant issued by a judicial officer upon probable cause, (527) supported by oath and particularly describing the person to be seized; that otherwise this and other principles of liberty, solemnly announced in the Constitution for the purpose of restricting the power of Congress, may be annulled and made of no effect, the Judiciary ignored as a coördinate branch of our Government, and the Executive invested with absolute power to imprison any citizen at discretion. In other words, the President would be a *dictator;* that the act would not have been passed for any such purpose, and if it was, it is unconstitutional and void.

There was no argument on the side of the enrolling officer. I infer (see General Order 31, 10 March) the Secretary of War insists that the effect of the suspension is to empower the President or the Secretary of War, by general or special orders, to authorize the arrest and detention, as a prisoner, of any person for any of the causes specified, and to suspend all inquiry by the *Judiciary* in regard to the legality of the arrest or the cause of it.

There is certainly a wide difference of opinion as to the effect of the suspension, and one not easy of solution. It would be a matter of regret if the bill passed under a misapprehension in regard to the effect of a suspension of the privilege of the writ. But it is not necessary for the purpose of this case that I should form or express an opinion on that question; for it will be conceded that whether a case is embraced by the act, or not, is a *question of law for the courts,* and I have a clear conviction that the clause authorizing the suspension of the privilege of the writ does not apply to the case before me, which is an application for a

civil remedy to assert a private right under a contract, the party not being charged with the commission of, or an intention to commit, any crime.

There are several kinds of writs of *habeas corpus.* Bacon Abr., (528) title *Habeas Corpus.* (1) *Habeas corpus ad subjiciendum,* which is the main writ, called the "writ of right," "the bulwark of liberty," and by way of preëminence, "the writ of *habeas corpus,*" which a person who stands committed or detained as a prisoner for *any crime* may obtain from a court of common law, or a single judge in vacation time by 31 Charles II., ch. 2 (Rev. Code, ch. 55, sec. 1), on which the matter will be inquired of and the prisoner discharged, bailed, or remanded. (2) A *writ of habeas corpus for a civil cause,* when the right to the custody or services of a person is contested, and he is imprisoned or otherwise restrained of his liberty for *any other cause* than the commission of the criminal offense. At common law in such cases a writ *homine replegiando* may be sued out. That is an original writ, and under it the body is replevied subject to the decision of the Court. Fitz Herbert N. B., 68, E.; Comyn Dig., Pleader, 3 K., 1; Imprisonment L., 4. "So a man unlawfully detained in custody may have *homine replegiando, si non captus sit preceptum regis* (that is, if not imprisoned for crime). 2 Inst., 55. This is a civil suit to determine the right to the custody. *Homine replegiando* lies for a negro or an Indian brought into England (3 Mod., 120); or if one takes a wife, or a child, or apprentice of another.

This original writ is now out of use, being superseded by a judicial writ issued by a court in all cases where *homine replegiando* lay to have the body returned, the right to the custody determined, and the person discharged or remanded. By statute 56, Geo. III., ch. 100 (1816), Rev. Code, ch. 55, sec. 10, this jurisdiction is extended to a single judge in vacation time, when any person shall be imprisoned or otherwise restrained of his liberty for any *other cause* than the commission of a criminal offense. *Musgrove v. Kornegay,* 52 N. C., 71, is an instance of a suit under this statute; it was a contest in respect to minor children instituted by a writ of *habeas corpus,* and brought to the Supreme Court by appeal. *Prue v. Hight,* 51 N. C., 265, is another instance; it was a contest as to an apprentice, decided on *habeas* (529) *corpus* before a single judge on a writ sued out by the alleged apprentice. 3 Keb., 5, 26, sec. 2; Lev., 128; 1 Strange, 444. A young lady brought before a judge on *habeas corpus* by one who claimed her as his wife. Many other cases might be referred to, in all of which the proceeding is treated as a civil suit to determine the right to the custody or services of a person. (3) A *writ of habeas corpus ad testificandum* to bring up a prisoner to give evidence before a court. (4) A *writ of*

habeas corpus ad respondendum. (5) A *writ of habeas corpus ad faciendum et recipiendum.* (6) A *writ of habeas corpus ad deliberandum et recipiendum.*

It seems to me perfectly clear that the clause of the Constitution giving power to Congress to suspend the writ of *habeas corpus* refers to the writ of *habeas corpus ad subjiciendum,* when a person stands committed or detained as a prisoner for a crime within 31 Charles II., ch. 2; Rev. Code, ch. 55, sec. 1, and does not include the other writs.

Our Constitution, with a few alterations, is taken from that of the United States, which rests on the Constitution of England as its substratum, with some modifications, conferring certain powers on the legislative branch of the Government which in England are vested in the Crown. The clause in the Constitution of the United States and of the Confederate States is in these words: "The privilege of the writ of *habeas corpus* shall not be suspended unless in case of rebellion or invasion, when the public safety may require it." These words do not confer the power affirmatively, but by what is called a negative pregnant. An explanation of this is to be found in the history of the times. In England it was a vexed question whether Parliament could suspend the privilege of the writ of *habeas corpus* unless in cases of rebellion or invasion. There are some precedents for suspending it when there is no rebellion or invasion, but the authority of these precedents is questioned.

(530) In 1777 Lord North brought in a bill to suspend the writ of *habeas corpus* in cases of treason or sedition committed in any of the colonies. The bill was violently opposed. There was no rebellion or invasion in Great Britain, and it was denounced as unconstitutional and dangerous to liberty. Lord North had to yield and allow it to be amended by inserting a proviso: "Nothing in this act shall be construed to extend to persons resident in Great Britain." This concession gave extreme offense to the leaders of the high prerogative party, who had zealously supported the bill in its original state. Miller, Cont. Hume, and Smollett, 187-'8. In framing the Constitution of the United States the purpose was to settle this vexed question and to limit the power expressly to times of rebellion or invasion. So the *occasions* on which the privilege of the writ may be suspended are fixed by the Constitution in so many words. In respect to the cases and the writs to which the suspension might be made to apply, no question had ever been raised. It was conceded by all persons of all parties, and at all times, that the suspension could only include cases of persons who stand committed or detained as prisoners for some criminal or supposed criminal offense, treason, sedition, and the like, and the writ applicable to such cases. No precedent can be found among the rolls of Parliament where the suspension has ever been made to extend to civil cases or the writs

used in such cases, or to any of the other kinds of the writ save that which is styled *"the writ of habeas corpus,"* applicable to the case of persons committed for crime and within the provision 31 Charles II., ch. 2; Rev. Code, ch. 55, sec. 1. Hence the words "when the public safety may require it" were deemed sufficiently explicit in respect to the cases and the kind of writ to which the suspension would apply. What reason can be conceived for extending the suspension to the writ of *habeas corpus ad testificandum* or the other inferior writs, or (531) to that kind which is used as a civil remedy, and is a civil suit substituted in place of the action *homine replegiando,* as in *Musgrove v. Kornegay* and *Prue v. Hight. supra,* and the case of the lady claimed as a wife, and others of a like nature with which the public are not directly concerned?

One would as soon expect to find in the Constitution power conferred on Congress to suspend the right to a writ in case for money had and received, against tax collectors for an excess exacted under a wrong construction of the tax bill, and paid under protest; or the right to a writ in trespass, for false imprisonment, against military officers for illegally arresting men as conscripts, with which cases the public interest may indirectly be made to connect itself, as bearing on the amount of taxes collected, or the number of men put into the service. Suppose, by reason of the difficulty put in the way of this kind of writ of *habeas corpus,* the old action, *homine replegiando,* should be resorted to. Will any one venture to say the supension would apply to that action? It is worthy of remark that the special writ to the sheriff, and summons to the party detaining, prayed for in this petition and authorized by the statute, 1862, are very similar to the proces used in that action when brought by the party restrained of his liberty.

On so grave a subject every word must be supposed to have some import; and every word used in this clause does import that the power of suspension has reference only to the writ applicable to the case of persons imprisoned for crime. *"The privilege."* When one is committed to await his trial for a crime, it is a privilege to be allowed a writ whereby the legality of his arrest may be inquired of, and he may be discharged or admitted to bail. But when one who has not committed and is not supposed to have committed a criminal offense is wrongfully restrained of his liberty, that he should be allowed to institute a civil suit to be relieved from the confinement is a *right* which every State is bound to secure at all times to its citizens; and these words must import that the power of suspension refers only to the former (532) class of cases, otherwise no meaning can be attached to them. *"The* writ of *habeas corpus,"* using the definite article instead of *"a* writ." Why?—to designate that kind which, by way of preëminence, is

called *"the* writ of *habeas corpus." "Shall not be suspended.* The other kinds of the writ never had been suspended or their suspension thought of, so this negative points to that kind which had been before suspended, and in regard to which the public mind had been so frequently and so violently agitated. "Unless in cases of rebellion or invasion, when the public safety may require it." There is nothing in the purpose for which the other kinds of the writ are used that has the slightest reference to times of rebellion or invasion, or to the public safety; but in times of internal commotion it might affect the public safety if persons who had committed, or were suspected of the intention to commit, treason, sedition, or other like offenses should be allowed to go at large; so these words also point to the suspension of that kind of the writ which might be used to obtain a discharge, and put it in the power of such malefactors to carry out their treasonable and seditious practices.

The remaining question is, Does the case made by this petition present matters for a writ of *habeas corpus* under the first section of the statute, "if any person shall stand committed, etc., for a crime, he may, in the vacation time, complain to a judge, who, on view of a copy of the warrant of commitment, or otherwise on oath that it is denied, shall grant a writ of *habeas corpus"*; or does it present matter for a writ of *habeas corpus* as a civil remedy to assert a private right under section 10, when any person shall be arrested or otherwise restrained of his liberty "for any *other cause* than the commission of a criminal offense, he shall be entitled, upon its appearing by affidavit that there is reasonable ground for the complaint, to a writ of *habeas corpus"?*

(533) The case clearly falls under scetion 10. The petitioner does not show that he was committed for a crime, but that he is restrained of his liberty as a conscript. He avers he is not liable to conscription, and asks for the writ as a civil remedy to establish his right under a contract. I am to take it, until otherwise decided by the Supreme Court, that the act of Congress conscripting principals of substitutes is unconstitutional, according to the decision in *Walton's case, ante,* 310;* so there appears to be reasonable ground for the complaint.

Will it be said Congress has power to pass an act, and then make it a crime to apply for a civil remedy to test its constitutionality, and to suspend the privilege of *habeas corpus,* so as to exclude the question from the *courts?* (!!) I shall leave the proposition stated nakedly, to be looked at in silence, as the best mode of exposing its error.

The petitioner avers that he has been arrested and detained as a conscript, and make a case for a writ under section 10, to which the power

*NOTE.—The decision in *Walton's case* was reversed at June Term, 1864, *ante,* 325, subsequently to the filing of this opinion.

of suspension does not apply. Can the tables be turned so as to put him in the condition of one committed or detained as a prisoner for a crime, and make it a case for a writ under section 1, to which alone the power of suspension does apply? This application for a writ is a *consequence,* and not the cause of the arrest and detention complained of; and to detain the man as a prisoner for making the application, and substitute a certificate of that fact for a return to the writ, inverts the order of things. If he is detained as a *prisoner,* he becomes an encumbrance, and the purpose of using him as a conscript is defeated (534) unless there can be another magical change by which he will no longer be considered to be detained as a prisoner, but to be held as a conscript. The proposition requires no comment.

The party is, in my opinion, entitled to a special writ.

22 May, 1864.

NOTE.—*Vide In re Roseman, ante,* 368; *contra, In re Long,* next case; *In re Rafter, post,* 537.

Cited: In re Cain, ante, 312; *In re Russell, ante,* 391.

IN THE MATTER OF M. LONG.

(2 Winst., 150.)

The act of Congress suspending the writ of *habeas corpus* held applicable constitutionally to the case of a person who was claimed as a conscript under the act of 17 February, 1864, and that the judge was prohibited from issuing the writ.

BATTLE, J. This is an application to me for a writ of *habeas corpus,* founded upon the allegation that the petitioner, having been liable to perform military service, had heretofore put a substitute in the Army of the Confederate States to serve in his stead for three years or the war. He contends that the late act of Congress, under the authority of which he has been again enrolled and taken into custody, is unconstitutional and void.

A grave question is at once presented, whether I am not prohibited from issuing the writ. An act was passed at the late session of Congress entitled "An act to suspend the privilege of the writ of *habeas corpus* in certain cases." This act was passed under the authority of a power conferred upon Congress for the purpose, and its constitutionality cannot be doubted. It is binding upon all the judges, both of the Confederate and the State courts, and they are not at liberty to issue the writ, or, if issued, to proceed under it, in any of the cases specified in the act.

(535) These cases are clearly defined and classified in the first section, and among them is a class marked with the number 5. The question before me arises upon the specification in that class, "of attempts to avoid military service." Are not persons who are claimed as conscripts, or as otherwise liable to military service, and who apply for a writ of *habeas corpus* for the purpose of thereby getting exempted from it, making attempts to avoid it? To my mind it seems clear that they are. They are certainly within the letter of the clause, and why are they not within its spirit? To this it is said that the act was intended to apply only to those who, being liable to perform military duty, were unlawfully attempting to evade it, and not to those who seek the benefit of the writ for the sole purpose of establishing their claim to exemption from such duty. That cannot be so. Such a restricted construction of the act would tend strongly to defeat the great purposes it was intended to accomplish. It could not, in the terms of the Constitution, be passed at all unless the country were invaded or in rebellion. The salvation of the country is the object sought, and the framers of the Constitution who authorized the act of suspension, and the legislators who passed it, deemed that object so transcendently great that, for the time, all individual rights which conflicted with it ought to give way to it. The spirit, then, as well as the letter of the clause, must embrace all persons, without any exception, who are making "attempts to avoid military service." But if the words upon which we are commenting admitted of any doubt, it is entirely removed by the proviso which immediately follows them. In that proviso a clear, definite, and precise remedy is given to any party who does not legally "owe military service." If any such person be wronged by a subordinate officer, his superior shall give prompt redress to the injured party and at the same time punish the wrongdoer by dismissing him from office. Why is this prompt redress thus expressly provided for a party not liable to military service, unless it was be-
(536) cause the great remedial writ of *habeas corpus* is taken away from him?

I am aware that in the case of *Walton, ante,* 350, and others lately decided by *Chief Justice Pearson* at Salisbury, he held that the act suspending the writ of *habeas corpus* did not apply to them; but why he so held, I regret that I am not informed. The question is now presented to me, and I cannot avoid deciding it. If, in my opinion, I have no authority to issue the writ, I cannot stand justified before the country should I do it.

In deliberating upon the subject, another question occurred to me, which is, whether I ought to issue the writ and await the return of the officer before deciding upon the effect of the act, or to decide that question now. Section 3 of the act may at first view seem to favor the former

course. That section provides for the stay of the proceeding under the writ, when the officer, who has a party in custody, shall certify on oath that he detains him for any of the causes specified in the act. The true construction is, I think, that when the petition itself shows the cause of the detention, and it is one of those mentioned in the act, the judge cannot issue the writ at all; but if such cause be not stated in the petition, then the writ must be issued, and the proceedings under it can only be suspended upon its being made to appear by the affidavit of the officer that the true cause of the detention is one of those embraced in the act.

I have thus endeavored briefly and plainly to set forth the reasons why I feel bound to decline issuing the writ of *habeas corpus* applied for in this case.

Chapel Hill, 29 February, 1864.

NOTE.—*Vide In re Rafter*, next case; *contra, In re Cain, ante*, 525; *In re Russell, ante*, 388.

Cited: In re Roseman, ante, 368; *In re Spivey, post*, 542.

IN THE MATTER OF P. RAFTER.

(2 Winst., 153.)

1. When the return of the officer to a writ of *habeas corpus* disclosed the fact that the petitioner was held as a conscript under the act of Congress, *Held*, that the judge could proceed no further with the case, but must remand the petitioner.

2. The act of Congress suspending the writ of *habeas corpus* is constitutional.

MANLY, J. The answer of the officer, having custody of the (537) petitioner, to the writ of *habeas corpus*, discloses a case which cannot be prosecuted further under the writ. The following return is made: "W. T. Shipp maketh oath that Patrick Rafter was arrested and is now detained by him as a person liable to do military duty, and who is attempting to avoid the same; that his arrest and detention is in pursuance of the authority of the Secretary of War of the Confederate States."

The act of Congress, after declaring the writ of *habeas corpus* suspended in its application to arrests made by the President or Secretary of War in certain enumerated cases, provides that "during the suspension no military or other officer shall be compelled, in answer to any writ of *habeas corpus*, to appear in person, or return the body of any person

detained by him by the authority of the President or Secretary of War; but upon the certificate, under oath, of the officer having charge of any one so detained, that such person is detained by him as a prisoner under the authority aforesaid, further proceedings under the writ of *habeas corpus* shall immediately cease, and remain suspended so long as the act shall continue in force."

It appears to me clear, from the provisions of the law, that Congress intended to take away from the ordinary tribunals of the country
(538) all inquiry by *habeas corpus* into arrests made by the President or Secretary of War, professedly in any of the enumerated cases.

Congress is so guarded upon this point that it prescribes the form of the return which the officer cited by the writ is to make, and which it declares shall be sufficient; and this form tenders no issue, and leaves open no opportunity for making an issue, upon the construction of the law. The officer's return, in the case before me, pursues the form prescribed; and that, by the terms of the act, puts an end to all further inquiry. It results that no question can be properly raised in the matter before me unless it be a question as to the power of Congress to pass such a law. I see no sufficient reason for holding the law invalid for defect of power.

The Confederate Constitution (Art. I, sec. 9, par. 2) declares that the writ of *habeas corpus* shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it. This is a "negative pregnant," which implies a power in Congress, within the sphere of the General Government's action, to suspend the writ, as the Parliament of England was wont to do, subject to the limitation that the power shall be exercised only in cases of rebellion and invasion, when the public safety may require it. Invaded from all quarters by the public enemy, as the States were at the late session of Congress, the occasion had arisen when that body might lawfully consider of the exigency for a suspension of the writ. It did so consider; decided in favor of a suspension in the cases enumerated; and this decision is necessarily conclusive.

It is conceded as a high exercise of the legislative power; but it is believed not to be beyond its legitimate range, while the momentous and profound exigencies with which the country is now struggling are its full justification.

An affidavit is found among the papers, from which it appears that petitioner claims now to be 47 years of age, and to be exempt by
(539) reason thereof from enrollment to do military service to the Confederate States. According to the view taken by me of the law, the question thus raised is excluded from consideration. But if it should turn out that I am in error in this construction, and the point be made and considered, it will not avail the petitioner.

The first section of the military bill provides that all white men between the ages of 17 and 50 shall be in the military service of the Confederate States during the war. In the fifth section, those between 17 to 18 are placed in a reserve corps, not to serve out of the State in which they reside. In the eighth section power is given to the President to detail from the class between 45 and 50, persons for office, hospital, and other similar duties. No restriction seems to be imposed upon the employment of this latter class in military field duties; and the enrollment and arrest for duty of petitioner are not, therefore, an illegal interference with his personal liberty. Indeed, had Congress limited the field of duty to the State, as in the case of persons between 17 and 18, the mustering him into service simply, and placing him in a camp of instruction near the capital of the State, which is the alleged trespass upon his rights, would not be illegal. The arrest and detention would not be without warrant of law; and the writ under which he is seeking redress is confined in its office to the enlargement from imprisonment or custody of persons so arrested and detained, and none others.

Upon the questions which have arisen out of the laws of April and September, 1862, as well as that of January last, usually called the conscription acts, some future occasion may be afforded of giving to the public my views. At present I abstain from any discussion of them, as it is not necessary, and they may be the subject of future reviews in the Court of which I am a member.

I deem it proper to state that the petition in the case does not set forth the alleged ground for the petitioner's arrest; but I concluded to overlook this defect and meet at once the questions raised upon (540) the construction of the law. I mention it here that it may not be regarded as a precedent against me. In general, it is believed to be more consistent with a just and prompt execution of the laws to require petitioners to set forth the grounds of controversy so far as they are known; and if the petition disclose a case to which the act of suspension clearly applies, it seems to me it ought to be rejected.

The petitioner is remanded to the custody of the officer.

NOTE.—*Vide In re Long, ante,* 534; *In re Cain, ante,* 525; *In re Roseman, ante,* 368; *In re Russell, ante,* 388; *In re Spivey,* next case.

IN THE MATTER OF SPIVEY.

(2 Winst., 156.)

When the officer made return to the writ of *habeas corpus*, that he held the petitioner as a conscript under the act of Congress, and for that reason did not return his body: *Held*, that the return was sufficient under the act of Congress suspending the writ of *habeas corpus;* and *Held further*, that the body not having been produced, no judgment of discharge could be rendered.

PEARSON, C. J. The petitioner had put in a substitute, the writ issued 16 February, 1864, was executed on 9 March, and the following returns made:

CONSCRIPT OFFICE,
RALEIGH, N. C., 8 March, 1864.

HON. R. M. PEARSON, *Chief Justice, N. C.:*

In answer to your summons, demanding the body of N. G. Spivey before you without delay at Richmond Hill, I hereby certify that (541) the said Spivey is detained by me under orders of the Secretary of War as a prisoner for an attempt to avoid military service.

PETER MALLETT,
Col. Com'd'g Conscripts for N. C.

The certificate was sworn to, but the oath was afterwards made.

On 8 April, 1864, Mr. Boyden, counsel for the petitioner, after notice to Colonel Mallett, moved for judgment of discharge, on the ground that the act of Congress suspending the writ of *habeas corpus*, by its proper construction, does not embrace the case of one who, like the petitioner, not being liable to conscription, simply applies for a writ to test the constitutionality of the act subjecting principals of substitutes, that not being an attempt to avoid military service within the meaning of the act; and that as section 3 contemplates that writs are still to be issued (*In re Roseman, ante,* 368), it involves an absurdity to say that the application for the writ is a cause for detaining the man, not as a *conscript*, but as a *prisoner.*

The fact of applying for the writ cannot be made the foundation of a certificate, which is to be substituted in place of a return of the body, that Colonel Mallett acted under *general* orders of the Secretary of War, which orders are unconstitutional and void; for which he relied on the case of *Wilkes,* where *Chief Justice Pratt* so decided.

The certificate is so general as not to raise these questions. For the purpose of this motion the return is to be taken as true; it negatives the

allegation that the petitioner is detained as a conscript, and avers that he is detained as a *prisoner* for an attempt to avoid military service. I cannot know *judicially* what the act was which is considered to be such an attempt. It may be that Spivey secreted himself, or tried to escape within the limits of the enemy; or it may be he is one of those men who, not being liable to conscription, in the language of *Judge Battle* in *Long's case, ante,* 534, "seek the benefit of the writ for the sole (542) purpose of establishing their claim to exemption from such duty." I am not at liberty to presume that the petitioner, being in the first instance arrested and detained as a conscript, his application for the writ is made the ground for the averment that he is detained as a prisoner for an attempt to avoid military service, which would be a *consequence* and not the cause of the detention for which he makes complaint and prays may be inquired of, and this would seem, as Mr. Boyden says, to involve an absurdity.

Nor can I know judicially whether the orders of the Secretary of War are general or special; that is, whether Colonel Mallett is ordered to arrest and detain as prisoners all persons who attempt to avoid military service, leaving it to him to say what constitutes such an attempt, and to pass on the law as well as the facts, and to certify his conclusion on oath, or whether he was ordered specially to detain N. G. Spivey as a prisoner for an act which the Secretary of War considered as amounting to an attempt to avoid military service within the meaning of the act of Congress. So the certificate gives me nothing to act on.

2. Mr. Boyden then moved for judgment of discharge, in the nature of a motion for judgment *non obstante veredicto,* on the ground that the certificate is insufficient by reason of its generality. He insisted that filing the certificate required by the act is a condition precedent to the suspension of further proceedings, which in this case has not been performed. For there might as well be no certificate at all as one that the man is detained as a prisoner under orders of the Secretary of War for one of the causes specified in the act, without setting out which one; and this, he urged, would surely not be a performance of the condition. He relied on *Croke James,* and *In re Douglass,* 43 E. C. L., 992, where the parties are discharged by reason of the insufficiency of (543) the return.

In both of these cases "the body" was returned and was in *custodia legis,* and I have not been able to find any case in which judgment of discharge is rendered where the Court is not in possession of the thing to be acted on, which is the body in *habeas corpus* cases. Without that, no judgment can be given. This conclusion is supported by all of the common-law analogies; no one could be tried unless he were present. A man convicted of murder cannot be sentenced unless he is before the

court, and the judgment is void if it do not appear by the record that the culprit was at the bar of the court. *S. v. Craton,* 28 N. C., 164. Nay, the rule at common law was so imperative that the court could not try the prisoner, although he was at the bar, unless he put in a plea; and to compel him to plead, the *peine forte et dure* was anciently resorted to. It is superseded by a statute authorizing the court, if a prisoner stands mute, to enter the plea of not guilty for him. So in civil cases there must have been an appearance before judgment could be rendered; hence the process of distress infinite, outlawry, etc., to compel an appearance and a rule on the sheriff to bring in the body when a *capias ad respondendum* had issued, which is also altered by our statute. In *habeas corpus* cases, *alias* and *pluries* writs, rules, attachments, etc., are resorted to to compel a return of the body. There is no statute applicable to *habeas corpus* cases, which stand in this respect as at common law; so judgment cannot be rendered unless the body be returned.

Motion for judgment of discharge not allowed.

11 April, 1864.

NOTE.—*Vide In re Rafter, ante,* 537, and note.

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(544)

IN THE MATTER OF AUSTIN.

(2 Winst., 160.)

The Governor is not authorized to require the *Home Guard*, which is composed in part of persons exempt from militia duty, to perform the service of arresting deserters and conscripts. He may require the *militia* to perform this service.

PEARSON, C. J. The writ in this case was returned before me at Richmond Hill. As it presented a new question, I desired to have the aid of *Judge Battle* and *Judge Manly* at the hearing, and also the benefit of argument by counsel. For which purpose it was adjourned to this place (Raleigh). I regret that I have been disappointed. It becomes my duty to decide the case without the presence of the other judges, and without argument, except by Mr. Furches and Mr. Winston in behalf of the petitioner; so that I am not apprised of the ground on which the Governor rests his claim of authority.

The petitioner is exempted as a conscript by reason of a substitute, and is exempted from duty as a militiaman by force of the first section of the act of the last session of the Legislature, entitled "An act in rela-

tion to the militia and a guard for home defense." Major Harbin sets out in his return to the writ, that he had the petitioner arrested under an order of the Adjutant General for the purpose of arresting conscripts and deserters, "as said Austin was a member of the Home Guard and liable to perform said duty." The order is in these words:

RALEIGH, 15 September, 1863.

Maj. A. A. Harbin will immediately call out the Home Guard of Davie County, and arrest every deserter or recusant conscript within said county, and deliver them to Colonel Mallett at Camp Holmes. If it be necessary, you can pursue said deserters beyond the limits of your county. Those citizens who aid, harbor, or maintain de- (545) serters will be arrested and bound over to the courts to answer said charges. You will report to this office the manner in which this order has been executed.

By order of GOVERNOR VANCE:

J. A. FOOTE, *A. A. Gen.*

The question presented by the petitioner and return is of great importance. On the one hand, if the Governor is authorized to require the Home Guard to perform the service of arresting deserters and conscripts, it will promote the efficiency of the Confederate Army; on the other hand, it will impose on citizens who, by the acts of Congress and the Legislature, are exempted from conscription and militia duty, a dangerous and irksome labor.

The subject must be considered by a judge "as a dry question of law," unaffected by collateral considerations growing out of the condition of our country, and for this reason, his conclusion may differ from that of those who are at liberty to look at it under the bias of feeling.

It is a part of the duty of a soldier of the Confederate Army to arrest deserters and recusant conscripts. The Governor of a State has certainly no authority to require a citizen, unconnected with any military organization, to perform this part of the duty of a Confederate soldier. Whether the Governor had authority to require a citizen belonging to the militia to perform this duty is a question which has not been decided. It may be conceded that the Legislature has power to give this authority to the Governor in respect to the militia, on the ground that they were liable to be called into service of the Confederate States, and might be required to do a part of the duty, as a compensation for not being called into service and required to do the whole duty of a Confederate soldier. But it is a question worthy of great consideration whether the Legislature has power to authorize the Governor to require this duty of citizens who do not belong to the militia, (546)

which is the only military organization, except enlisted soldiers, recognized by the Constitution. It is not necessary for the purposes of this case to decide the question, and it is referred to only for the sake of applying the rule, "Where a power has never been before exercised and is doubtful, the courts will not presume that it was the intention of the Legislature to assume it, but will require a clear expression of an intention to do so."

The matter, then, stands thus: The Governor has no authority to require a citizen who does not belong to the militia to perform this part of the duty of a Confederate soldier. Has the Legislature conferred the authority upon him? It is insisted that this is done by the act of the last session, entitled "An act in relation to the militia and a guard for home defense," which act and the act "to punish aiders and abettors of deserters" were ratified at the same time, 7 July, 1863, and are to be construed together. So the question depends upon the meaning and proper construction of these two statutes.

At the meeting of the Legislature two questions were pending: First, Congress in its wisdom having allowed substitution and many other exemptions from the conscription acts, was it in the power of the President, by calling upon the State for its quota of militia, to subject the persons so exempted as conscripts to military duty as militia? Second, had the Governor authority to require the militia to arrest conscripts and deserters from the Confederate Army? By the first section of the act "in relation to militia and a guard for home defense," the first problem was solved, and it is enacted that all persons exempted as conscripts shall be likewise exempted from service as militia. By the third section of the act "to punish aiders and abettors of deserters," it is enacted that

the Governor may require the militia to arrest deserters and con-
(547) scripts; thus solving the second problem, by authorizing the Governor to call out the remnant of the militia, that is, those not exempted from militia duty, to perform a part of the duty of Confederate soldiers, to wit, the officers of the militia and the men between 40 and 45 who had not then been called for as conscripts.

In order, however, to provide for home defense, the Legislature assumed the power of making *State conscription.* Whether the Legislature had the power to do so is a question into which it is not necessary to enter. The power is expressly assumed, and it does not become a coördinate branch of the State Government to decide upon it unless it be necessary to do so in order to dispose of a case before it. So it may be granted that the Legislature had power to organize for home defense a military body composed of the remnant of the militia, the exempts and persons over the age liable to militia duty. It is very certain that in doing so the intention was to make this new body wholly distinct and

different from the militia. Persons exempt from militia duty are included, new companies are formed, new officers appointed—in fact, everything is different; it is a new organization—a State conscription made for special purposes, "to be called out against invasions and to suppress insurrections" (section 6). And special care is taken to distinguish this new body from *militia,* for otherwise they might, under the Constitution, be called for by the Confederate States. Upon what ground, then, can it be insisted that the Governor is authorized to require this newly organized body and peculiar State institution to perform a part of the duty of Confederate soldiers? It is said the authority follows as a consequence of the military organization. I cannot see the force of the argument. In the act declaring the special purposes for which this new organization is made, no such authority is expressly given to the Governor. The power of the Legislature to confer it, even if such had been the intention, is by no means clear; and so we are not at liberty by implication to infer that such was the inten- (548) tion, and the act "to punish aiders and abettors of deserters" puts the matter, as it seems to me, out of the range of discussion, by *expressly authorizing* the Governor to use *the militia* to arrest deserters and conscripts; thereby excluding, as plainly as words could do it, any authority to require such service of this new organization—the State conscripts, Home Guard. *Expressio unius, exclusio alterius,* is a well established rule of construction which the courts are not at liberty to disregard, and its soundness, when the object is to ascertain the intention of the Legislature, and neither to fall short of it nor go beyond it, is fully illustrated by this case. So the two statutes relied on as conferring the authority on the Governor actually exclude it by a double implication. In the first place, the act authorizes the Governor "to call out the Home Guard against invasions and suppress insurrections." Why was it not added, "and to arrest deserters and recusant conscripts," if such was the intention? That subject was present to the minds of the Legislature. In the second place, the act authorizes the Governor, in so many words, "to call out *the militia* to arrest deserters and conscripts." Why did it not add, and "also the Home Guard," if such was their intention? The conclusion that it was not the intention of the Legislature that the *Home Guard* should be subject to thi service is as clear as if the acts contained the words, *"Provided, however,* that the Governor shall not have authority to require the *Home Guard* to arrest deserters and conscripts," unless it be contended that the Governor has all power except such as is expressly prohibited—a position which I suppose no man will venture to assume.

The argument may be stated thus: The statute expressly authorizes the Governor to require "the militia," that is, the officers and men be-

(549) tween 40 and 45, to arrest deserters. They form a part of the Home Guard. It follows that the Governor had no authority to require the *whole body* of the Home Guard to perform this duty; for if he had such authority, it was vain, idle, and superfluous to authorize him expressly to require a part to do that which he had authority to require of the whole. In this connection the provision, section 9, "The commissions of the officers of the militia shall be suspended only during the period of their service in the Home Guard," has an important bearing, the object being to preserve the organization of the militia, and to use them to arrest deserters; for which purpose the force was then adequate. The fact that, afterwards, the call for the men between 40 and 45, as conscripts, made the force inadequate, cannot change the meaning and proper construction of the statutes. If an amendment was thereby made necessary, the Legislature must make it; for neither the Governor nor the judges have authority to strain the law to meet the emergency.

I am aware of the responsibility under which I act. Jurisdiction is given to a single judge in vacation; my decision fixes the law until it is reversed by the Supreme Court or the law is amended by the Legislature; and I would not feel it to be my duty to stay the action of the Executive except upon the clearest conviction.

Whether, in the event the Governor should call out the Home Guard to repel a raid or suppress an insurrection, he would not, while the men were on this tour of service, which is limited to three months (sec. 6), have authority collaterally to require them to take up deserters and conscripts who might aid the enemy, is a question not now presented. We are confined to the naked question, Has the Governor authority to require the Home Guard to be called out for the mere purpose of arresting deserters and conscripts? The special order under which Major Harbin acted is for this purpose alone. It is true that the State was, before the passage of the acts, invaded, and the enemy was at that time, and (550) is now, within the limits of our State; but, as the order does not profess to be made for the purpose of repelling that invasion, there is no "tour of duty prescribed by the Governor not exceeding three months at any one time," according to the provisions of section 6. The time is unlimited, and the purpose is declared to be "to arrest every deserter and recusant conscript within the county of Davie, and deliver them to Colonel Mallett at Camp Holmes."

The suggestion that, as the arrest of deserters and conscripts would promote the efficiency of the Confederate Army, and thereby tend to defend the State against invasion, the authority of the Governor can be sustained on that ground, involves a latitude of construction unsupported by any principle of law, and, as it seems to me, cannot impress with much force the mind of any one who will read the two statutes atten-

tively and in connection. He will see, from the mode of defense contemplated by the Legislature in calling out the Home Guard for defense against invasion and insurrection, by regiments, battalions, and companies, on tours of duty within the State, not to exceed three months, etc., that the indirect and far-off mode of repelling the existing invasion, by arresting deserters and conscripts, was not in the mind of the Legislature, except when the Governor was authorized to use the *militia* for that purpose; which, according to the view I have taken above, excludes the conclusion that the Guard for Home Defense—the State conscripts—were to be used for that purpose also; for, if so, it was surely vain, idle, and superfluous to impose that service on the militia, who constituted but a small part of the guard for home defense.

The position was taken on the argument that the order under consideration clearly exceeds the Governor's authority, in this: It requires the guard for home defense "to arrest and bind over to the court, to answer said charges, those citizens who aid, harbor, and main- (551) tain deserters," and is, therefore, void *in toto*. It is true, citizens who aid, etc., deserters, etc., although made liable to indictment by one of the statutes referred to, cannot, according to the Constitution and laws of the land, be arrested and bound over to court to answer the charges, by military authority; that can only be done by the civil authority, to wit, a warrant by a judge or justice of the peace, on probable cause shown on oath, and executed by the sheriff or constable. So it is clear that part of the order is void and against law. But it does not vitiate the other part of the order, provided the Governor had authority to make it.

It is thereupon considered by me that Richard M. Austin be forthwith discharged.

CASES IN EQUITY

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

JUNE TERM, 1864

JAMES AND ROBERT SLOAN AND OTHERS v. CYRUS P. MENDENHALL, ADMINISTRATOR, AND OTHERS.

(Winst. Eq., 1.)

A. dies intestate, seized of land in fee simple in this State, which descends to her heir at law resident in another State. His creditors here sue out attachments which are levied on the land, and final judgments are obtained therein and writs of *venditioni exponas* issued. The land is sold by B., the administrator of A., under an order of the county court, for the payment of the debts of the intestate. After payment of them, the administrator is bound in equity to pay the residue to the creditors who attached the land, notwithstanding that the administrator has paid it by order of the nonresident debtor to another *bona fide* creditor.

IT appeared by the pleadings and exhibits in this case that Mrs. Mitchell was seized in fee of a house and lot in the town of Greensboro, and died intestate in the year 1855, and the defendant Mendenhall was her administrator, and applied by petition to the county court of Guilford for an order to sell the house and lot, alleging that the personal property was insufficient to pay the intestate's debts; and such (554) order being made, the premises were sold, and out of the proceeds of the sale the debts were paid, and part of the residue was applied to the payment of a debt which the heir of Mrs. Mitchell, John S. Dare, owed to R. G. Lindsay, one of the defendants, by the express order of Dare, and the other part was paid to J. and R. Sloan, two of the plaintiffs, in part satisfaction of a judgment obtained by them against Dare,

as is hereinafter stated. In 1848 Dare was indebted to R. G. Lindsay, and J. and R. Sloan were his sureties for the payment of the debt. Dare executed and delivered a deed purporting to convey his interest in the house and lot, stated therein to be an estate in fee in remainder after the death of Mrs. Mitchell, which deed was absolute on its face, but it was admitted by the defendants that it was intended by the parties thereto to be a security for money; and it was not registered until after the lapse of seven years or thereabouts. The defendant Dare was indebted to J. and R. Sloan, to Jesse H. Lindsay, and to John A. Mebane, and in 1843 removed to another State, where he has ever since resided. After Mrs. Mitchell's death, before the sale by her administrator, the plaintiffs J. and R. Sloan sued out an attachment against Dare as an absent debtor, which was levied on the house and lot and prosecuted to judgment, and a writ of *venditioni exponas* was issued. The plaintiffs Lindsay and Mebane severally attached the same property for debts due to them respectively, and prosecuted their attachments with like effect. The defendant Mendenhall had notice of the attachments before he paid the money in discharge of the debt to R. G. Lindsay. The plaintiffs severally demanded of Mendenhall the payment of their respective claims before this suit was brought, out of the proceeds of the sale, but he refused so to apply the money, except the sum which he paid to the
(555) Sloans in part payment of their judgment.

J. T. Morehead for plaintiff.
Gilmer for defendants.

PEARSON, C. J. John S. Dare, on the death of his mother, became the owner of a house and lot, in fee simple, as her heir at law, subject to a power of sale by her administrator in the event that a sale was necessary for the payment of her debts.

The plaintiffs, by the suits and judgments under their attachments, acquired a lien on the house and lot, and but for the exercise of the power of sale by the administrator of Mrs. Mitchell, they would have been entitled to have the house and lot sold for the payment of their debts. Having been deprived of this right at law by the sale by the administrator, the question is, whether they are not entitled in a court of equity to follow the funds in the hands of the administrator, and have it applied in discharge of their debts, after deducting the amount applied by the administrator in payment of the debts of his intestate.

We think the equity a clear one. The plaintiffs had acquired a lien, and have an equity to be relieved from the accident that the property was sold under a power which the law gave to the administrator of the ancestor. The lien of the plaintiffs having attached, it follows that the

defendant Dare had no right to dispose of the fund in the hands of the administrator, nor had the administrator as such, or as the agent of Dare, any right to make an application of the fund remaining in his hands after discharging the debts of his intestate.

It is properly conceded that the deed executed by Dare to R. M. Lindsay is of no effect, and it is equally clear that the plaintiffs J. and R. Sloan are not estoppel, by receiving a part of the fund, from setting up their equity to have such an amount as may be necessary (556) applied to the payment of their debt, as they had acquired the first lien. The administrator, if he was in doubt as to the right of the creditors of Dare, ought to have retained the fund and filed a bill of interpleader. As two of the plaintiffs, Sloan and Lindsay, were sureties on the debt of R. M. Lindsay, to which the administrator applied the fund, he is entitled to a credit, as against them, for a ratable part of that debt; that is, such as they were bound to pay upon contribution with the other sureties of Dare.

There will be a reference to ascertain this amount and show the sums to which the plaintiffs are respectively entitled.

SOLOMON S. PEELER v. DAVID BARRINGER.

(Winst. Eq., 5.)

The plaintiff alleged in his bill that he had conveyed his land and his horses, mules, hogs, etc., wheat, hay, corn, etc., to the defendant, by a deed absolute on its face, but which was intended to be only a security for the payment of money, and was put into the form of an absolute sale by the fraud and oppression of the defendant, and that defendant had advertised a public sale of all the property. He is entitled to an injunction; and although the answer positively denied any fraud or imposition, or that there was any agreement or understanding that the plaintiff should have any right of redemption, yet as the answer contained admissions, which, taken in connection with the allegations of the bill, furnish a probable ground of belief that the latter are substantially true, the injunction ought to have been retained until the hearing.

(557)

THIS was an appeal from an interlocutory order made by *Kerr, J.*, at Fall Term, 1862, of ROWAN, dissolving an injunction granted in the vacation before.

The order in the court below was made on motion upon the coming in of the answer. Every part of the bill and answer necessary to the full understanding of the case is stated in the opinion of the Court, except

that the answer contains a positive and direct denial of any fraud or imposition on the plaintiff, and of any agreement or understanding that the conveyance was not to be an absolute sale.

Moore and Boyden for plaintiff.
Bragg for defendant.

PEARSON, C. J. This is not the case of *ordinary* injunction to stay proceedings on an execution, after the right of the defendant has been established by a judgment. The plaintiff alleges that being pressed by executions, in order to prevent a sale of his property, he applied to the defendant to aid him in raising the money, and take a lien on the property. The defendant agreed to pay off the executions, provided he would save him harmless by including the amount for which he was liable as plaintiff's surety. Accordingly the plaintiff executed a deed absolute on its face, and the defendant commenced writing a paper to show that the plaintiff was to have the privilege of redeeming his property, but afterwards, on various pretenses, refused to sign it, saying the plaintiff must take his word, and insisting that the deed should be absolute on its face. So, the plaintiff avers, the deed was obtained by taking undue advantage of him by reason of his necessities; and seeks to set up his equity to redeem on paying principal and interest.

In aid of this primary equity, the plaintiff prays that the defendant may be enjoined from exposing his property to public sale, or otherwise making way with it, until his equity to redeem can be established; (558) and he puts his right to an injunction on the ground that if the property is sold, as contemplated by the defendant, he will be turned out of his house and home; and his property, consisting in a great part of horses, mules, corn, wheat, hay, hogs, sheep, farming utensils, and other articles of the kind, will be scattered all through the country, so as to make it impossible ever to regain it; and so the loss will be irreparable, and the very purpose of his bill, should he succeed in establishing his equity, will be defeated.

The defendant insists that he made an absolute purchase of all of the property, and denies that there was any understanding that the plaintiff should be at liberty to redeem.

It is certain that if the property is exposed to public sale and scattered through the country it will be impossible to reclaim it specifically, and the plaintiff's primary equity would be thereby in a great measure defeated. So the question of injunction is of a *special nature,* and must be treated and considered in the character of a sequestration, which the court will not remove until the hearing of the cause, when it appears by the bill and answer that the claim of the plaintiff is probably well

founded, and is not merely frivolous and vexatious; for as the defendant is secured by the injunction or sequestration bond, the court having the property under its control, will take care of it, so that it may be subject to its final decree.

In cases like this under consideration, equity assumes jurisdiction on the principle of giving effect to the agreement of the parties; and when it appears that the intention was to secure the payment of money, and the transaction has been made to assume the form of an absolute conveyance by fraud, ignorance, accident, or advantage taken of a needy man, the court will not be trammeled by the form, and will give effect to the intention. In illustration: A. borrows money, and to secure its payment executes a deed, to be void provided the money and (559) interest are paid by a given day; otherwise, the estate to be absolute. The money is not paid and the estate becomes absolute at law; but a court of equity will interfere and allow the property to be redeemed, on the ground that it was not the intention of the one to sell, or of the other to buy; but the deed was given as a *security* for the money, and it is against conscience for the creditor to insist on keeping the property. So in a case like the present, if it was not the intention of the one to sell, or of the other to buy, and the actual intention was to let the property stand as a security, equity will, as between the parties, give effect to the intention, by disregarding *the form* which the transaction has been made to assume, and convert the deed, although absolute on its face, into a security; it being against conscience for the creditor to insist upon keeping the property absolutely.

In our case, this Court is of opinion that the bill and answer show "probable cause" in support of the plaintiff's equity. In fact, the admission of the defendant, taken in connection with the circumstances of the transaction, would seem to make out the plaintiff's case, although in respect to that question we are not at liberty in this stage of the proceeding to deliver our opinion.

The deed conveys the plaintiff's land, horses, mules, sheep, hogs, corn, wheat, hay, farming utensils, etc.—just such articles as are usually contained in a deed of trust. The defendant does not allege that the property was valued separately, or that the *price* (as he considers it) was fixed on in reference to the *value of the property;* but the amount inserted in the deed had reference merely to the amount of the executions, and the amount for which he was liable as surety. This is inconsistent with the idea of an absolute purchase. It is not usual for a man to wish to sell, or for one to wish to become the purchaser of, such an infinite or indefinite variety of articles by the wholesale. Indeed, it is evident that the plaintiff did not wish to sell, and the defendant admits he did not wish to buy. All he wanted was to be *saved harmless.* (560)

He admits that he did commence writing an instrument to show that the plaintiff was to have the right to redeem, but on reflection concluded not to do it, and thereupon the plaintiff delivered the deed to him; the plaintiff retained *possession of the property.* The defendant admits that he afterwards repeatedly offered to let the plaintiff have the property back, provided he was indemnified, as all he wanted was to be "saved harmless," which is the very thing the plaintiff now offers to do, and which he has done by the injunction bond; unless the defendant is at liberty to insist on *the time;* but in such matters it is a maxim of equity that "time is not of the essence of the contract." This is the foundation of the doctrine concerning equities of redemption in mortgages and all dealings of that nature.

There is still another view of the case: Can any one be made to believe that the plaintiff would have executed the deed if he had supposed that the defendant could come the next day and turn him out of house and home and scatter all the accumulations of his plantation to the winds, by exposing it to public sale? That was the very thing he desired to prevent, and its prevention the sole purpose for which he asked the aid of the defendant. This was well known to the defendant. So if it was his intention at the time not to allow the plaintiff to redeem, he practiced a fraud by concealing it; and if he intended at the time to allow him to redeem, he cannot now in conscience refuse to do so.

So, taking it either way, the defendant procured the execution of the deed by a positive fraud, or else he procured it by taking underhand advantage of the necessities of the plaintiff, the pressure of which induced him to put himself in the power of the defendant and trust to his (561) good conscience; and the defendant cannot be allowed in equity to disregard the trust reposed in him and set himself up as an absolute purchaser, and thereby give to the transaction the result of doing the very thing which he well knew it was the plaintiff's object to avoid, viz., an absolute sale of the property.

There is error in the decretal order dissolving the injunction. Let this opinion be certified to the court below, to the end that the order be reversed, and the injunction continued over until the hearing.

Cited: High v. Lack, 62 N. C., 179; *Williams v. Moore, id.,* 212.

BENJAMIN F. CROSSLAND AND ANOTHER v. FRANCIS E. SHOBER AND ANOTHER.

(Winst. Eq., 10.)

Courts of equity have no jurisdiction to reform a marriage settlement by which property is conveyed to the separate use of the wife, when the bill alleges no fraud, imposition, error, or mistake, in respect of the contents of the deed or its execution, and there is no allegation that any provision of the deed has been found to be hurtful to the fund, prejudicial to the interest of the parties, or of marked inconvenience in execution.

THE bill sets out that the plaintiff married in July, 1859, having a short time before executed a deed jointly with the defendant Francis E. Shober, by which everything then owned by Mrs. Crossland, and everything which she might thereafter acquire, or which might come to her by act of law, was conveyed to the defendant Shober in trust for the sole and separate use of Mrs. Crossland, with power to her to dispose of the property by will during the coverture. The deed provided that in case Mr. Crossland died in his wife's lifetime, the trustee should reconvey all the property to her, and if Mrs. Crossland died first, the property not disposed of by her will should go to the issue of the marriage, and if there was no issue, to such persons as would take her property (563) in case she died unmarried and intestate. The bill states that there is issue of the marriage, the defendant Lizzie Crossland; it then says that the plaintiffs are desirous that the settlement should be reformed by vesting all of the property in the husband, or such part of it as the court shall think proper, and concludes with a general prayer for relief. A guardian has been appointed to the infant, who answers, submitting her rights to the court. The trustee answered, admitting the facts set forth in the plaintiffs' bill, and submitting to perform what decree the court might make.

Winston, Sr., for plaintiffs.
No counsel for defendants.

MANLY, J. We are at a loss to conceive of any principle of jurisdiction in courts of equity upon which the bill of complaint can rest.

No fraud, imposition, error, or mistake is alleged in respect to the deed, or in respect to its execution. No provision has been pointed out which in its practical working has been found hurtful to the fund, prejudicial to the interests of the parties, or of marked inconvenience in execution. Those who entered into it, therefore, must abide its operation.

To reform a marriage settlement at the instance of the wife upon whose stipulation and for whose benefit it was intended would expose

such instruments to frequent change and much uncertainty and lead to mischief, which we are anxious to avoid. Married women can only be allowed to deal with the separate estate in conformity with the faculties conferred on them by the deed, and if not restricted in terms by the instrument, can charge specifically income or profits, with the con-
(564) currence of the trustee. Beyond this, it seems to us, it would be mischievous to enlarge her faculties.

A power during the coverture to modify at will the provisions of the deed would remove at once the protection secured by these rules, and render of little or no avail such deeds of settlement. Parties cannot be relieved from the incidental chafing of such restraints as they may choose, for prudential reasons, deliberately to impose on themselves in respect to the control of property, any more than they can be relieved fro mthe occasional unpleasant force and effect of the matrimonial ties themselves.

Both may be relieved by gentle and prudent conduct appropriately tempered, but not by the courts.

The bill must be dismissed.

MICHAEL SCHOFFNER AND ANOTHER v. HENRY FOGLEMAN AND OTHERS.

(Winst. Eq., 12.)

1. The interest of a purchaser of land, when the purchase money is not paid and the title is retained as a security for its payment, is considered and treated as an equity of redemption.

2. The purchaser of an equity of redemption at sheriff's sale has a right to call for the legal estate upon discharging such part of the mortgage debt as remains unpaid.

3. In sales of land under execution there is a distinction between the cases in which the defendant has an interest subject to execution and cases where he has not such interest. In the first mentioned cases the purchaser becomes the owner of the defendant's interest. If it be an equity, upon discharging the encumbrances on it, he has a right to call for the legal estate. In the last mentioned cases the purchaser only succeeds to the equity of the debtor to the extent of holding it as a *security* for the money paid.

4. An equity of redemption cannot be sold under an execution for the mortgage debt.

5. Where land is sold, and the purchaser gives a bond with a security for the payment of the purchase money, and the title is retained as a further security for its payment, the surety for the original purchase money has

the first equity to be indemnified, and his claim is preferred to that of a purchaser of an equity of redemption at sheriff's sale, or of any encumbrancer who comes in by assignment or otherwise; and the question of notice has no relation to such cases, because neither party has the legal estate.

IN 1852 a tract of land belonging to one Ingold, an infant, con- (565) taining 10 acres on which there was a mill, was sold by order of the court of equity of Alamance County, and bought by John S. Fogleman at the price of $306, for which he gave his bond, payable to the clerk and master of the court, with Henry Fogleman and others as his sureties.

In 1854 a tract of 9 acres adjoining the 10-acre tract (which on Ingold's death had descended to his heirs) was sold by order of the same court, and was purchased by John S. Fogleman for $60, for which he gave his bond with Henry Fogleman and others as sureties.

In 1857 judgment having been recovered against John S. Fogleman, by the clerk and master, on his bond for $306 and execution issued, the execution, and other executions against the same defendant were levied on the 19 acres and on another tract of land belonging or supposed to belong to the defendant; George McRay, one of the plaintiffs, was the purchaser of the 19-acre tract from the sheriff at the price of $405; he assigned his bid to the other plaintiff, Michael Schoffner, who paid the money to the sheriff and took a deed for the land, which did not set forth what interest in the land John S. Fogleman had at the time of the levy and sale, or what interest in the land was conveyed to the purchaser, except that it was bargained and sold to him and his heirs. Schoffner took possession under the deed.

In 1859 a bill was filed by Henry Fogleman and his cosureties (566) against John S. Fogleman, alleging that John having become insolvent, Henry had been forced to pay the purchase money, except $50 paid by John, praying that the mill and 10-acre tract be sold for his indemnity. On reference to the clerk and master, he reported that Henry had paid the sum of $377.91 as surety of John; an order of sale was made, and William Hudson became the purchaser at $300, for which he gave his note with a surety.

Henry Fogleman also filed a bill in respect to the 9-acre tract, alleging that he had been forced to pay the purchase money, $95, and that he had assigned his equity to Patterson and Bason; whereupon it was ordered that the clerk and master make title to them, which he did.

The plaintiffs charge in their bill that Henry Fogleman paid $15 as surety for the purchase money of the 10-acre tract and the whole price of the 9-acre tract; and prayer of the bill is for a decree that Henry Fogleman and William Hudson release to the plaintiff Schoffner all

claims, etc., to the 10-acre tract, upon the payment to Henry Fogleman of $15 and interest, and that the clerk and master execute a deed to the said plaintiff for the said tract in fee simple; and for a like decree as to the 9-acre tract against H. Fogleman, Patterson, and Bason, on the payment of $95 with interest; and there is the general prayer for relief.

Graham for plaintiffs.
No counsel for defendants.

PEARSON, C. J. In 1852 the mill and the 10 acres of land were sold by order of the court of equity and bought by John S. Fogleman, at the price of $306, for which he gave his note with Henry Fogleman and others as sureties.

In 1854 the lot of 9 acres adjoining was sold by order of the court of equity, and bought by John S. Fogleman at the price of $95, for
(567) which he gave his note with Henry Fogleman and others as sureties.

In 1857 judgment was taken in the name of the clerk and master on the note of $306, execution issued, the mill and 19 acres were sold, and bought by McRay at the price of $405. McRay did not pay the money, and the sheriff was forced to pay it, and was allowed by the plaintiff's attorney to have the execution renewed. Schoffner took the bid off McRay's hands, paid the sheriff, and took his deed in the usual form. It does not set forth, as required by statute, that the title was held as security for the purchase money. Schoffner took possession under the deed.

In 1859 a bill was filed by Henry Fogleman and his cosureties, against John S. Fogleman, alleging that said John having become insolvent, Henry had been forced to pay the purchase money, except $50 paid by John, praying that the mill and 10 acres be sold for his indemnity. On reference to the clerk and master, he reported that Henry had paid the sum of $377.94 as the surety of John; an order of sale was made, and William Hudson became the purchaser for $300, for which he gave his note with a surety.

Henry Fogleman also filed a bill in respect to the 9-acre tract, alleging that he had been forced to pay the purchase money, to wit, the $95, and assigned his equity to Patterson and Bason; whereupon it is ordered that the clerk and master execute title to them, which he did.

The plaintiff Schoffner asserts an equity under the sheriff's deed to pay off the encumbrances and have the legal title conveyed to him. In respect to the 9-acre tract, he submits to pay the $95, and asks for a conveyance from Patterson and Bason. In respect to the 10-acre tract,

including the mill, he insists that the amount paid by Henry Fogleman does not exceed the sum of $15 which he submits to pay, and asks for a conveyance by the clerk and master.

The defendants deny the equity of the plaintiff, on the ground (568) that the interest of John S. Fogleman was not subject to execution, and so he acquired nothing; but they aver that before the bill was filed they offered to release all claim to the land, provided Schoffner would pay the amount which Henry Fogleman had been obliged to pay as the surety of John S. Fogleman, which he refused to do.

The interest of a purchaser of land sold by a clerk and master, or other person, when the purchase money is not paid, and the title is retained as a security, is considered and treated as an "equity of redemption," the purchaser being in fact a mortgagor, in the same way as if the vendor had made title and then taken a mortgage to secure the purchase money. *Green v. Crockett,* 22 N. C., 390.

The purchaser of an "equity of redemption" at sheriff's sale has a right to call for the legal estate upon discharging such part of the mortgage debt as remains unpaid, by the provisions of the act of 1812. Rev. Code, ch. 45, sec. 546.

When the defendant in the execution has a trust or other equitable interest, which is not embraced by the act of 1812, a purchaser at sheriff's sale does not acquire the equity of the debtor, but is substituted to his rights "to the extent of holding it as a security for the money which he has paid." *Taylor v. Gooch,* 49 N. C., 486. I will remark for the purpose of correcting the error that the word "creditor" is put in the "headnote" of that case, and also in the opinion, as reported, in place of "debtor." The mistake is obvious from the context; for it is the *debtor* who has the equity, to which the purchaser succeeds as a security for the money he pays. The creditor has only a judgment and execution, to which the debtor's equity is not liable, and the money paid is considered as so much advanced for the debtor on the security of his equity.

The difference between buying at sheriff's sale an equity which is the subject of execution, and one that is not, is this: in the former case the purchaser becomes *the owner* of the equity, and upon (569) discharging the encumbrances is entitled to the legal estate, although it may greatly exceed in value the amount which he has paid; whereas in the latter case the purchaser only succeeds to the equity of the debtor, to the extent of holding it as a *security* for the money paid: in other words, he becomes an encumbrancer merely, and the debtor still holds the equity, and upon discharging the encumbrance may call for the legal estate; and he is the person entitled to any excess which there may be in the value of the land over the encumbrances on it.

An "equity of redemption" cannot be sold under an execution for the *mortgage debt.* The reason is obvious; for the purchase money would be applied in payment of the mortgage debt, and so the purchaser would get the legal estate, and in effect pay nothing for the equity of redemption, which is the very thing he professed to buy and the sheriff undertook to sell. For illustration: suppose a tract of land worth $2,000 to be under mortgage for $1,000. If the sheriff sells the "equity of redemption" under an execution for some other debt, and it is bid off at $1,000, the purchaser on paying the mortgage debt gets the land at its supposed value of $2,000; but if the sheriff was allowed to sell the "equity of redemption" under an execution for the mortgage debt, the $1,000 bid for it would extinguish the debt, and the purchaser could call for the legal estate without paying one cent more, and in fact get the land for $1,000 (half its value) and pay nothing for the equity of redemption. *Camp v. Cox,* 18 N. C., 52.

The sureties for the original purchase money have the first equity to be indemnified, and their claim is preferred to that of a purchaser of the equity of redemption at sheriff's sale, or any subsequent encumbrancer who comes in by assignment or otherwise; and the question of notice has no bearing in such cases, because neither party has the legal es-
(570) tate, and the right turns on priority. *Polk v. Gallant,* 22 N. C., 395; *Green v. Crockett, supra.*

To apply these principles to our case: 1. In respect to the mill and 10 acres of land. The execution being for the mortgage debt, the "equity of redemption" was not subject to be sold under it; so McRay and his assignee, Schoffner, did not acquire the equity of redemption by the sheriff's deed; and Schoffner's equity was that of a subsequent encumbrancer, and John S. Fogleman still held the equity of redemption, and the right to have the land by discharging the encumbrances.

Schoffner, in order to enforce his equity, ought at once to have paid such part of the original purchase money as remained unpaid, and then filed a bill to have the land sold for his indemnity. Instead of doing so, he enters into possession and rests contented with the sheriff's deed until the sureties for the original purchase money file a bill, and the land is resold for their indemnity. Schoffner then comes forward and asks to be relieved from the effect of that deed, which was to purchase the mortgage, on the ground that he had not been made a party to the proceeding. We think he is entitled to relief to that extent, and there will be a decree for a sale of the land, the price to be brought in and subject to further directions.

2. In respect to the 9 acres of land. The equity of redemption was subject to sale under the execution; and if he had proceeded at once to pay off the $95 mortgage money, he could have called for the legal title,

but for a difficulty which will be mentioned below. He hangs back, however, until the surety, Henry Fogleman, assigns his equity to Patterson and Bason, and a deed is made to them by the order of the court, whereby the mortgage is foreclosed. The difficulty alluded to is that the 19 acres were sold together; so there is no mode of ascertaining what he paid for the equity of redemption; and to meet the justice of the (571) case, there will be a decree for the sale of this parcel also; the two parcels to be sold together or separately, as the commissioner may deem best, the whole fund to be subject to further directions. There will be a reference to ascertain the amount which has been paid by Henry Fogleman or any of the other sureties. This amount, with interest and the costs incurred in seeking indemnity (of which the master will also report), will be first paid out of the fund. Then the amount paid by Schoffner on the execution, allowing him interest and charging the rents and profits received by him. The residue, if any, will belong to John S. Fogleman or his assigns. The clerk will also report what amount was due on the note given by John S. Fogleman for the price of mill and 10 acres at the time of the sheriff's sale, and how much has been received by the clerk and master on account of this debt. The Court has had no little difficulty about it, for the clerk and master reported when the bill was filed for a resale that Henry Fogleman, as surety, had paid $377.94, and it seems from the plaintiff's admissions that John S. Fogleman had paid $50, and the sheriff says he paid to the attorney who had the note for collection $405, which greatly exceeds the price of both tracts of land, and needs explanation.

Let there be a decree for the sale of the land and an account, and the cause will be retained for further directions. Remanded.

NOTE.—A vendor who contracts to convey upon payment of the purchase money is, as between the parties, a mortgagee. *Ellis v. Hussey*, 66 N. C., 501; *Derr v. Dellinger*, 75 N. C., 300. The interest of one who holds land under bond for title, the price not having all been paid, is not subject to sale under execution. *Ledbetter v. Anderson*, 62 N. C., 323. Neither is the vendor's interest liable to execution sale. *Moore v. Byers*, 65 N. C., 240; *Blackmer v. Phillips*, 67 N. C., 340; *Fogler v. Bowles*, 72 N. C., 603; *Tally v. Reid*, 72 N. C., 336; *s. c.*, 74 N. C., 463. But when all the purchase money has been paid, the vendee's interest may be sold under execution. *Phillips v.* (572) *Davis*, 69 N. C., 117.

Where a debtor conveys property in trust to sell and pay certain creditors, the trustees hold in trust for the creditors, and then in trust for the debtor as a resulting trust. The resulting trust cannot be sold under execution as an equitable estate. After the debts are paid, the resulting trust is liable to sale under execution. But a mixed trust cannot be sold in that way. *Sprinkle v. Martin*, 66 N. C., 55.

Where one purchases land and takes a paper-writing intended by all the parties to be a deed, the seal being left off by inadvertence: *Held*, the pur-

chaser acquired no interest that is subject to execution. *Hinsdale v. Thornton*, 74 N. C., 167; *s. c.*, 75 N. C., 381. Only such equitable interests as are authorized by the act of 1812 can be sold under execution. *Mannix v. Ihrie*, 76 N. C., 299. An equity of redemption cannot be sold under execution for the mortgage debt. *Myrover v. French*, 73 N. C., 609. Still a mortgagee may purchase the equity of redemption at an execution sale had at the instance of a stranger. *Barnes v. Brown*, 71 N. C., 507.

Cited: *Rogers v. Holt*, 62 N. C., 111.

Dist.: *Myrover v. French*, 73 N. C., 611.

JULIA M. PATTON v. JAMES A. PATTON AND OTHERS.

(Winst. Eq., 20.)

1. Where real estate of an inheritance is purchased by a partnership for partnership purposes, and is so used, on the death of one of the partners his widow is entitled to dower.

2. A testator devised land and bequeathed personal estate to sundry persons. By a residuary clause he gives all the rest of his estate, real and personal, to his executors, in trust to sell and divide the proceeds among his wife and children. Then follows immediately this clause: "I direct my executors to keep my estate together and not to *hand over* any of the devises or legacies until my existing railroad contracts in Tennessee and North Carolina are completed." *Held*, the last clause has relation only to what is given by the residuary clause.

THE plaintiff filed this bill to recover dower in the lands of which her late husband, William A. Patton, died seized and possessed.
(573) There was no controversy except about a piece of land, called the tanyard lot, and some tracts of land devised to her late husband by James W. Patton, deceased.

The material facts respecting the tanyard lot are: In 1861 William A. Patton, Washington Morrison, James A. Patton, and Samuel G. Kerr formed a partnership for the purpose of tanning leather, manufacturing leather into shoes, etc. William A. Patton was the owner in fee of a piece of land conveniently situated for carrying on the business of the firm. He conveyed three-fourths of it to three other partners, retaining the other fourth, and each partner put his fourth into the partnership as part of his stock, and the whole piece of land was used for the purposes of the firm during its continuance. As to the other subject of controversy, James W. Patton devised several town lots and tracts of land

to his son, W. A. Patton, in fee, and bequeathed to him some slaves. He devised and bequeathed many other town lots and tracts of land and slaves to his wife and children, other than William A.

The will then proceeds as follows: "All the rest and residue of my estate, real and personal and mixed, wherever situate, including land, negroes, chattels, and every interest, legal and equitable, I will, devise, and bequeath to my executors hereinafter named, and such of them as act, and the survivors of them, in trust to be sold at public or private sale, as they may judge best, and the lands in tracts or parts of tracts or lots, as they may from time to time judge best, and on such terms as they may determine for the interest of the estate, and out of the proceeds of the sales and collections of the debts due to me pay all debts owed by me, and the surplus of said funds to pay over to and distribute equally between my said wife, Henrietta Kerr Patton, my sons James A. Patton, William Augustus Patton, Thomas W. Patton, and my daughter, Frances L. Patton. I direct my executors to keep my estate together, and not to hand over any of the devises or legacies until my existing railroad contracts in Tennessee and North Carolina are completed"; (574) and after giving some practical directions respecting his railroad contracts, the testator says: "And after the said railroad contracts are completed, the various legacies and devises herein contained shall take effect. But, in the meantime, the provisions herein made for my wife shall take effect at once, or such part thereof as she desires," and "if for any cause my executors should think it necessary to sell one or more of the slaves directed to be sold, even before said railroad contracts are completed, for bad conduct or other cause, they are at liberty to do so." The testator, James W. Patton, died in 1861, and W. A. Patton died in 1863.

Merrimon for plaintiff.
No counsel for defendants.

PEARSON, C. J. The right of the plaintiff to dower in the tanyard lot is settled by *Summey v. Patton, post,* 601. The lot having been sold by the surviving partners, there will be a reference to fix the amount to which she is entitled absolutely, according to the ratable value of her life estate.

We are of opinion she is also entitled to dower in all of the land acquired by her husband under the will of J. W. Patton, except the tracts or parcels of land which pass to the executors under the residuary clause, in trust to be sold by them, and the proceeds of sale divided equally among his wife and children. A devise operates as a conveyance. The land passes *directly* from the devisor to the devisee, and the

executor takes no estate or interest in it. For this reason the lands given specifically to the wife and children do not come within the operation of that clause which directs the executor "to keep my estate together, and not to *hand over* any of the devises or legacies until my existing railroad contracts in Tennessee and North Carolina are completed."

(575) In reference to land specifically given, the words "not to hand over" can have no application whatever. Indeed, apart from this principle growing out of the essential difference between a devise and a legacy, we should incline to the opinion that by a proper construction this restriction only applies to the property contained in the residuary clause. It is a part of that clause, and is naturally confined to the property therein disposed of, to say nothing of the unreasonableness of the supposition that it was the intention to tie up his whole estate, real and personal, until a future event which might not happen for several years, leaving his wife and children in the meantime to starve. If such had been the intention, there surely would have been some provision for their support. And the fact that the land in the hands of the devisees would still remain ultimately liable for the debts of the devisor, in aid of the other portions of his estate towards the completion of the railroad contracts, seems to confirm the soundness of this construction.

Decree for the plaintiff.

Cited: Ferguson v. Hass, 62 N. C., 115; *Mendenhall v. Benbow,* 84 N. C., 650; *Sherrod v. Mayo,* 156 N. C., 148; *Phifer v. Phifer,* 157 N. C., 229.

JOHN CARSON, EXECUTOR OF W. M. CARSON AND OTHERS, v. GEORGE S. CARSON AND CATH. CARSON AND OTHERS.

(Winst. Eq., 24.)

1. Where a deed recites that it is made in consideration of good will and affection to A., the wife of B., and the children of A. and B., namely, C. D., etc., *and such as they may have hereafter,* and property is conveyed by it to B. in trust "for the children aforesaid, and such as may be born and begotten by the said B. hereafter," the trust is for the children of A. and B., and the children of B. by an after-taken wife have no interest in the trust property.

2. B. having power by the deed to him to advance the children of himself and A. by conveying to them or any of them a portion of the trust property, on 6 January, 1850, conveys to his son John, a child of himself and A., a part of the trust property by way of advancement, as the deed declares, and on the same day John reconveys to B. the same property in consid-

eration of the natural love and affection he bears his half-brother and sister, the children of his father by an after-taken wife, in trust for his half-brother and sister, with power to B. to convey the property to the *cestui que trust* by deed or will, and B. by his will does devise and bequeath the property to his said two children, his will is inoperative, and the children by the last marriage take nothing under the deed from John.

IN May, 1842, Jonathan L. Carson and George M. Carson con- (576) veyed to William M. Carson lands, slaves, and other personal property by a deed which recites that it is made in consideration of the sum of $1, and the further consideration of the good-will and "affection the grantors have for Almyra Carson, the wife of William Carson, and the children of the said Almyra and William, namely, John, Martha M., Mary M., Matilda A., and William, and *such as they may have hereafter.*" After describing the property and limiting it to the grantee, his heirs, administrator, etc., the deed declares "that the said William shall hold and possess the property for the sole and separate use of his wife, the said Almyra, and the children aforesaid, and such as may be born and begotten by the said William hereafter." "and shall have power to receive and appropriate the proceeds, etc., towards the maintenance of his said wife and the children aforesaid, and such as he may have hereafter, and shall have power to apply the same towards the education of the said children, and as they come to years of maturity, to advance the same with such part of the said property and its increase as to him shall seem meet"; "and it is also provided, that in case the said Almyra shall depart this life before the said William, then her interest in said property of all kinds is to cease and determine, and the said William shall not only have power by deed to advance his said children out of said property in his lifetime, but he is hereby fully author- (577) ized at his death, by last will and testament, to devise and bequeath the said property and its increase to his wife and such of his children as he shall deem right; and in case he shall die without a last will and testament, then the said property, if his said wife be alive, shall be divided according to the laws regulating descent and dower and the laws distributing personal estate, and the said William is not to be liable to account to his said children—it being the true intent of this conveyance to provide for the wife of the said William and his present and future children, and to allow him to apply the property at his discretion to the benefit, support, nurture, education, and advancement of said wife and his present and future children."

Mrs. Almyra Carson died in 18..., and William M. Carson married again, and had two children of the second marriage—the defendants George S. and Catherine.

On 6 January, 1860, William M. Carson, by a deed purporting to be in consideration of the natural love and affection he bore to his son John (a son of Almyra), and for the purpose of advancing his son, and to be made in execution of the power given to him by the deed from Jonathan and George Carson to him, conveyed to his son a part of the property, real and personal, and on the same day John Carson reconveyed the same property to Willam M. Carson, in consideration of the natural love and affection he bore to his half-brother and sister, in trust for his half-brother and sister, George S. and Catherine. In 1862 William M. Carson died *testate*. By his will he devised and bequeathed the property conveyed to him by John to George S. and Catherine Carson, and appointed John his executor, who qualified and sues as such.

The other parts of the will are not here noticed, because the Court declines in the present stage of the cause to decide the questions arising thereon.

(578) *Merrimon for plaintiff.*
Fowle for defendants.

BATTLE, J. The main question presented in this case, and the only one which at present we think it proper to decide, arises upon the construction of the deed executed by Jonathan L. Carson and George M. Carson to William M. Carson on 6 May, 1862, in trust for his wife and children. The question is, whether the trust in favor of the children is confined to the children of the trustee's then wife, Almyra, or does it embrace also the children which he had by his second wife, Catherine?

We are clearly of opinion that upon any admissible construction of the deed it includes the children of the first wife only. The recital of the consideration on which the deed was made is the sum of $1 and "the good-will and affection they (the grantors) have for Almyra T. Carson, wife of said William, and the children of the said William and Almyra, namely, John, Martha M., Mary M., Matilda H., and William, and such as they may have hereafter." From this recital it is manifest that the purpose of the grantors to provide for the then wife of the grantee and such children as he and she then had and might have thereafter. The expression, "such as they may have hereafter," is too plain to admit of any other interpretation. In the clause which declares the trust it is said that the grantee shall have and hold the property conveyed "for the sole and separate use of his wife, the said Almyra, and the children as aforesaid, and such as may be born and begotten by the said William hereafter." It is contended for the children of the second marriage that the last words of this clause extend the trust to any children which the grantee might have by any future wife. This would be so if

the words were to be considered alone, unconnected with anything else in the deed; but that would violate a fundamental rule in the construction of deeds, "that the construction be made upon the entire deed, and not merely upon disjointed parts of it." 2 Bl. Com., (579) 379. These words, "and such as may be born and begotten by the said William hereafter," must be considered with reference to the recital of the consideration, which evidently is the good-will and affection which the grantors had for their brother's wife, Almyra, and the children which he then had and might thereafter have by *her*. Why the grantors should wish to exclude the children by any future wife we do not know. It may have been an inadvertent omission, but if it were, we cannot supply it.

There is a subsequent clause of the deed which provides "that if the said Almyra shall depart this life before the said William, then and in such case her interest in said property of all kinds is to cease and to determine." This is also urged as a manifestation of intention that she and her children were not the only objects provided for by the deed. It seems clear to us that the only purpose of this clause was to prevent the husband from taking any interest in the property *jure mariti*. The whole deed shows that his brothers thought they could not convey the property or any part of it, to be held by him for himself, and we have no doubt it was for the reason stated in the bill, that he was largely insolvent, and that if the property were conveyed to him without any trust declared in favor of his wife and children it would be taken to pay his debts. It was known to the person who drew the instrument that the equitable estate which the wife was to take in the property would, unless it were provided against, become her husband's upon her death; and hence the clause in question was inserted to prevent that consequence. The making her interest in the trust property cease and determine upon her death had the same effect in favor of her children as the limitation of it over to them would have had. See *Little v. McLendon,* 58 N. C., 216.

In all the clauses of the deed following that which we have just noticed it will be seen that the grantee's wife Almyra and her children were the only persons in the contemplation of the parties to the (580) deed; and such being the case, the hardship of excluding the children of the grantee by his second wife, no matter how great it may be deemed, cannot induce the Court to adopt a construction in opposition to the plain meaning of the instrument.

Having ascertained that there is no trust declared in favor of the children of the second marriage, in the deed executed to William M. Carson by his brothers, we are of opinion that he acquired no right to give such children by deed, will, or otherwise, the property, part of the trust fund which he conveyed to his son John on 6 January, 1860, and

took back by another conveyance of the same date. The deed to John purports to be an advancement to him by his father in execution of the power conferred on him as trustee; but the deed of reconveyance executed at the same time shows that the true purpose was not to advance the son, but the children of the second marriage. The execution of the two deeds is in effect but one transaction, and a court of equity cannot allow a trustee to change the objects of his trust by any such contrivance.

There are other questions presented by the pleadings which we are unwilling to decide without the aid of an argument. One of these questions is, whether the children of William M. Carson by his first wife had, during the lifetime of their father, such an interest in the trust property not advanced to them by their father, as trustee, as survived upon the deaths of some of them to their respective administrators. A second question is, whether the trustee had power to devise and bequeath by his will any part of the trust property to the children of his deceased daughter, Martha Burgin.

These questions will be reserved for future consideration; but there may be a decree now declaring that the defendants Catharine
(581) Carson and George S. Carson, children of William M. Carson by his second wife, do not take by the will of their father any part of the property, real or personal, conveyed to their father in trust by his brothers Jonathan L. Carson and George M. Carson, he having acquired no power to devise and bequeath it to them by reason of the conveyances of the same to and from his son John on 6 January, 1860. There may also be a decree for the sale of the land belonging to the trust fund, not specifically given or devised by the trustee to any of his children. And the parties may have a reference for an account of the trust fund, if they desire it.

Decree accordingly.

MARY B. SMITH v. DAVID SMITH, ADMINISTRATOR, AND OTHERS.

(Winst. Eq., 30.)

1. Gifts made by a husband to his wife during coverture will be supported in equity against the representatives of the deceased husband.

2. Contracts by the husband with the wife, for a valuable consideration, will be enforced against his representatives.

3. The widow of a deceased vendee of land, who has paid the purchase money, may by a bill against the heirs of her late husband and the heirs of the vendor compel a conveyance of the land by the heirs of the vendor to the heirs of the vendee, and an assignment of dower to herself.

THE plaintiff charges in her bill that at the time of her marriage with her late husband, Bryan Smith, she was the owner of a tract of land in Johnston County which her husband was desirous of selling, and at his request she consented to sell and convey it, upon his agreeing that he would convey to her, as a consideration for her land, another tract of land, or slaves of equal value with her land, or in some other way to secure her from loss. That her land was sold for $2,170, and in due form of law conveyed to the purchaser, and the price was received by her husband, who was tenant by the curtesy *initiate*. Before (582) his death he bought of one Whitley a tract of land which he intended to have conveyed to her in fulfillment of his promise to her; he paid the whole price to Whitley, but Whitley never made any conveyance to him. Her husband died possessed of the land bought from Whitley, and of many slaves, which are in the possession of David Smith, his administrator. The bill is against the administrator and heirs of her husband, and against the heirs of Whitley, and prays that the contract between her and her late husband may be specifically executed by the conveyance of the land bought of Whitley to her, by his heirs, or by the conveyance of slaves to her by the administrator of her husband; or that the money received by her husband as the price of her land may be paid to her, and that the heirs of Whitley may convey the land, sold by him, to the heirs of her husband, and that she may have her dower in it.

Moore for plaintiff.
No counsel for defendants.

BATTLE, J. The right of the plaintiff to a decree that the heirs at law of Thaddeus W. Whitley shall execute to the heir at law of her deceased husband, Bryan Smith, a conveyance for the tract of land mentioned in the pleadings, for the purchase of which there had been a contract in the lifetime of the parties, and that she may have dower therein, is undoubted. It is equally clear that she cannot have a decree for the specific execution of the contract made between her husband and herself, to have the said tract, or any other tract of land, or negroes of equivalent value, settled upon her in consideration of the price of the land sold under the circumstances mentioned in the bill. The contract which she made with her husband was by parol, and therefore void by the statute of frauds (Rev. Code, ch. 50, sec. 11), so far at least as a specific (583) execution is sought to be enforced. But, we think, the wife is entitled under the contract to the proceeds of her land, which was sold in consequence of it, subject to the interest which her husband, as such, had in the land. It is well settled that a husband may, after marriage, make gifts or presents to his wife which will be supported in equity

against himself and his representatives. *Lucas v. Lucas,* 1 Atk., 270; *Garner v. Garner,* 45 N. C., 1; Atherley on Mar. Set., 331. If a promise by the husband, made without a valuable consideration, to a wife, though imperfectly executed, will be enforced against his personal representatives after his death, where his intention had remained unaltered until that event, much more ought it to be enforced where she stands in the position of purchaser of the intended benefit for a full and fair value. See Adams Eq., 97.

The only question about which there can be any doubt is as to the amount to which the wife is entitled. After giving to the argument of her counsel that attention to which for its ability and ingenuity it is entitled, and after mature deliberation on the subject, we are of opinion that she cannot claim the whole price of her land, with interest from the death of her husband, but that the sum due her must be estimated upon the following principles: The contract for the settlement upon her of land or slaves, being made void by the statute of frauds, must be put entirely aside. So far as it entitles her to the money for which her land was sold, the contract must be considered in this Court as having been executed at the time when the price of the land was received by her husband; and as he had an interest for life in the land as tenant by the curtesy, he had the same interest in the proceeds of the sale. The relative value of his interest and hers must be ascertained as of that time,
and as the facts then existed; otherwise the maxim in equity, that
(584) what ought to have been done will be considered as done, will be
violated. See Adams Eq., 135. When the amount to which the wife is entitled is thus ascertained, she will be entitled to it, increased by the interest thereon from the time it came into the hands of her husband.

The argument against this mode of estimating the relative rights of the tenant for life and the owner of the reversion, founded upon the idea that it is better to make calculations upon certain and ascertained facts than upon uncertain and contingent events, will be found in practice more plausible than just. Suppose the owner for life of a valuable male slave were to agree with the owner of the ulterior interest to have him sold for the purpose of dividing the proceeds according to their respective ownerships, and the life tenant should die a week after the sale, would it be a just and fair execution of their agreement to give his personal representative nothing, or next to nothing? The death of the life tenant in so short a time was certainly not within the contemplation of the parties, and therefore ought not to control a division which was intended to be made between living men, having each his chance for a long or short life. At the time when the contract was made, it is manifest that the interest of the life tenant of such a slave would be regarded

as nearly his whole value, and it must be presumed that the parties had reference to that in making their agreement for a sale. Such being the case, subsequent events cannot fairly be allowed to change the principle upon which their contract was founded. The true rule is what we have above indicated, and the plaintiff may have a decree for the value of her interest in the price of her land, ascertained according to that rule.

Cited: *George v. High,* 85 N. C., 102; *Walton v. Parish,* 95 N. C., 263; *Cade v. Davis,* 96 N. C., 142; *Love v. McClure,* 99 N. C., 295; *Woodruff v. Bowles,* 104 N. C., 210; *Beam v. Bridgers,* 108 N. C., 279.

Dist.: *Dula v. Young,* 70 N. C., 454; *Hackett v. Shuford,* 86 N. C., 50.

NOTE.—Where there was an agreement between a husband and wife that if the wife would join him in a conveyance of a certain tract of land descended to the wife from her father, she should have another tract in lieu of the one so conveyed: *Held,* that when the husband received the money for the land so conveyed, he held it upon trust for his wife, and that his estate became responsible therefor. *Dula v. Young,* 70 N. C., 450.

Where land is purchased by a husband with his wife's money, the proceeds of the sale of her real estate, and title is taken to the husband alone, a resulting trust is created in favor of the wife, and a purchaser from the husband, with notice, stands affected by the same trust. *Lyon v. Akin,* 78 N. C., 258.

(585)

THOMAS HASKILL AND WIFE v. DANIEL FREEMAN AND WILLIAM J. LISK.

(Winst. Eq., 34.)

1. A. buys land from B. and pays the price, and directs B. to convey to a trustee for the sole and separate use of his (A.'s) wife and children. B. executes a deed with the intention of conveying the land accordingly, but from the ignorance of the draftsman the deed was inoperative. Afterwards A. conveyed the land to secure the payment of a debt to C. By virtue of an execution against C., his interest in the land is sold, and B. bought from the sheriff and took a deed from him for the price of $150. A. at the time of his purchase from B. was greatly indebted, and some of the debts which he owed then are still due. *Held,* A. and his wife may maintain a suit in equity to compel B. to convey to her sole and separate use.

2. The deed from the sheriff to B. is a security for the sum paid by B. ($150), and not for the amount of the debt due to C.

HASKILL *v.* FREEMAN.

THE bill was filed to compel the defendant Freeman to convey certain parcels of land to a trustee for the sole and separate use of Mrs. Haskill.

The facts of the case are stated in the opinion of the Court.

Winston, Sr., for defendant Freeman.

PEARSON, C. J. The plaintiff alleges he held a bond on the defendant Freeman to execute title to certain lots of land on the payment of the purchase money; that he paid the purchase money and directed (586) Freeman to make the title to the other defendant, Lisk, in trust for the separate and sole use of the plaintiff's wife and her children; and that the defendant Freeman executed a deed to the defendant Lisk for that purpose, but owing to the ignorance or mistake of the draftsman the deed is inoperative, because it sets out no consideration to raise the use upon which the statute can operate, so as to pass the legal estate; and the prayer is that the defendant Freeman shall execute a deed valid and sufficient for that purpose.

The defendant Freeman declines to do so, on the grounds, (1) that the purpose of the plaintiff in directing the deed to be made to his codefendant, Lisk, for the sole and separate use of his wife and children, was to defraud certain creditors who have debts against the plaintiff, contracted prior to the time when he made the first deed, which debts still remain unpaid; (2) because after the execution of the first deed, which turns out to be inoperative, the plaintiff assigned all his right and interest in the lots, and his equity to call for a reëxecution of a deed under the title bond, to D. Kendall and A. C. Freeman, to indemnify them as his sureties to a debt contracted for $275, and took from them a covenant to reconvey, provided he paid the debt on or before 1 January, 1855; that before that date he informed A. C. Freeman that he would not be able to pay the debt, and that he (A. C. Freeman) and D. Kendall must pay it, and reimburse themselves out of the land, and surrendered to A. C. Freeman the covenant for reconveyance; that accordingly A. C. Freeman paid off the whole of the debt and took possession of the land; that afterwards the land was sold under execution as the property of A. C. Freeman, when the defendant Freeman became the purchaser at the price of $150, and took the sheriff's deed therefor, and that Kendall has (587) conveyed all his interest to him, and that he has been in possession, claiming the land as his own, since 12 May, 1857.

The proof offered by the defendant Freeman establishes the fact that there are several old debts of Haskill, contracted before the date of the deed to Lisk, still unpaid. But the defendant has not proved the allegation that Haskill surrendered to A. C. Freeman the "covenant for reconveyance." The testimony of A. C. Freeman is that Haskill told him he

and Kendall would have the debt to pay, and must try to save themselves out of the land, as he was unable to pay it; and that he (A. C. Freeman) did pay the whole debt. The witness adds that "after the execution of the deed to Kendall and himself, Haskill surrendered the house and lots embraced therein to deponent."

After Haskill paid the purchase money, Freeman held the legal title in trust to convey to Haskill, or *any one according to his directions,* and the attempt to convey to Lisk being ineffectual, by reason of the ignorance of the draftsman, the plaintiff's equity to call for a reëxecution is a very plain one, unless it can be opposed on one of the grounds relied upon by Freeman.

1. It seems not to have occurred to Freeman at the time he executed the deed to Lisk, according to the directions of Haskill, that he was relieved of the obligation to perform the trust, on which he held the legal title, by reason of the indebtedness of Haskill, of which he had notice; and we are not aware of any principle of law or equity by which he can now fall back upon and shelter himself behind the rights of Haskill's old creditors, with whom he is in no wise concerned. The deed which he is now called on to execute will not tend to "hinder or delay" the remedy of those creditors; on the contrary, it will aid them by getting the title out of him and freeing it from all complication. His deed will be valid between the parties, and is not rendered void by the statute 13 Eliz., which applies only to conveyances made by the debtor, and in respect to creditors the case will come under the principles (588) discussed in *Rhem v. Tull,* 35 N. C., 57.

2. The deed of Haskill passed his equitable interest to Kendall and A. C. Freeman, subject to Haskill's right of redemption. It is not proved that Haskill surrendered to A. C. Freeman the covenant for reconveyance, and the fact that "he was unable to pay the debt and he and Kendall must do it, and try to save themselves out of the land," did not operate to extinguish his right of redemption.

Indeed, we are inclined to think that if he had surrendered, that is, handed back the covenant, it would not have had that effect, for there was no consideration paid; it was a voluntary act, and did not amount to a release, without which the rule applies, "Once a mortgage, always a mortgage."

Had A. C. Freeman sold the land for the purpose of raising money to pay the debt, the purchaser might have stood on higher ground; but he chose to pay the money and keep the land, or rather the equitable interest, which he had acquired, and of course held it subject to Haskill's right of redemption until it was foreclosed or released, or presumed to be abandoned from the lapse of time. The defendant D. Freeman then comes in as a purchaser at sheriff's sale, and stands in the shoes of

A. C. Freeman, in respect to the title, for it is well settled that a purchaser at sheriff's sale takes only the interest or title of the debtor; and the deed of Kendall, taken by the defendant Freeman, with notice and without a valuable consideration, leaves the equitable interest in his hands, subject to the plaintiff's right of redemption, and the thing has worked around in such a way that he is now in a condition to execute the title, which he before made an ineffectual attempt to do.

It occurred to us at one time that Kendall and A. C. Freeman ought to be before the court; but we are satisfied it was not necessary to make them parties, as it appears by the answer of the defendant Free-
(589) man that he has acquired their title, and they have no interest in the subject of controversy.

Another question is presented. In making redemption, is Haskill to pay the amount of the debt paid off by A. C. Freeman, or only the amount paid by the defendant Freeman when he purchased at sheriff's sale, to wit, $150? How it would be if a third person had purchased, it is unnecessary to decide, for we are satisfied that all the defendant Freeman is entitled to is to be indemnified against his outlay, on the ground that he held the legal title as a trustee, and in making the purchase advanced money in order to buy in an outstanding encumbrance which clogged the estate of his *cestui que trust,* and is not at liberty to speculate upon it. This is a familiar doctrine of equity.

There will be a decree for the plaintiffs, and a reference to ascertain the amount due, charging Freeman with rents and profits since he has been in posession and crediting him with the amount paid to the sheriff and interest.

NOTE.—*Vide Blount v. Carraway*, 67 N. C., 396.

Where a purchaser at execution sale gets no title by reason of defective description, he was subrogated to the rights of the execution creditor to the extent such creditor was benefited and the execution debtor exonerated by the sale. *Pemberton v. McRae*, 75 N. C., 497. See *Rowland v. Thompson*, 73 N. C., 504.

A purchaser at execution sale takes subject to all equities against the defendant, whether he has notice of them or not. *Rollins v. Henry*, 78 N. C., 342; *Hicks v. Skinner*, 71 N. C., 539; *Richardson v. Wicker*, 74 N. C., 278.

REBECCA W. TURNER v. ROSA KITTRELL AND OTHERS.

(Winst. Eq., 39.)

Testator by one clause in his will gives to his wife all his property of every species whatever, during her life. Another clause says that any children born during his marriage with his said wife shall be coequal heirs with her. The testator dies without having had any children born during his marriage. *Held*, the wife takes an absolute estate in all his property.

THE bill is filed by Rebecca W. Turner, the widow of the late (590) James A. Turner, and states that an order of sale of a tract of land belonging to certain infants had been made by the court of equity for Granville County, and at the sale made in pursuance thereof the plaintiff's late husband was the purchaser thereof; that the sale has been confirmed and the purchase money paid by Edward G. Cheatham, his executor. So much of the will of James A. Turner as relates to this suit is as follows: "I give and devise to my beloved wife, Rebecca W. Turner, all my property of every species whatever, to have and to hold for and during her natural life."

"It is my will and desire that any child or children which may be born during my coverture with my said wife Rebecca, or any child or children which may be born within the time prescribed by law after my decease, shall be coequal heirs with my wife Rebecca—that is to say, should there be one child, he or she shall be entitled to one-half of my property; if two children, one-third to each and one-third to my wife; to be held by them and their heirs in fee simple forever. Included in the above devise is any and all species of property which may accrue to me before or after my death, either by inheritance, gift, or bequest." The will was made in May, 1862, and the testator died in that year. There were no children born of the marriage. The suit is against the infants, who were owners of the land sold, and the heirs of James Turner. And the prayer is for a conveyance of the land to the plaintiff in fee.

MANLY, J. The rights of the complainant depend on the proper construction of the will of her husband, James A. Turner. After an attentive consideration of the whole body of the instrument, we are of opinion she is entitled to a conveyance of the entire parcel of land in fee.

This construction is necessary to avoid an intestacy in respect to the most important part of his estate, and to give effect to what seems to be the testator's manifest intention. The language of the will discloses a careful purpose to embrace in its bequests all his effects of every description. (591)

After sweeping up, as it were, and including everything, we cannot suppose that he would make so incomplete a disposition of it as to leave it entirely undisposed of in a contingency the most probable of those then in his mind.

He sets out by disposing of a life estate in his property of every kind. This he gives to his wife; and then turns to the task of carving out absolute estates in certain contingencies. The language of the will is peculiar. "It is my will and desire that any child or children that may be born during my coverture shall be equal heirs with my wife." This secondary disposition of his estate seems to be based upon the idea that the wife was an heir in any event, and proceeds to provide for children in case there should be one, two, or three.

The wife appears to be a primary object of care with the testator, and we cannot suppose that while he desired, in the event of having a child born to him, to give her one-half of his estate absolutely, he was unwilling to give her anything in case he had none.

Upon the whole, we think an intention is sufficiently apparent to give the wife an absolute estate in all his property, in the event the testator should have no children born to him from the marriage, and do so declare.

There should be a decree for a conveyance of the entire parcel of land described in the pleadings to the complainant, in fee.

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(592)

THOMAS WILKINS AND OTHERS v. C. L. HARRIS AND OTHERS.

(Winst. Eq., 41.)

1. The poverty of an executor is not of itself a reason for a court of equity restraining him from administering the estate.

2. There must be some maladministration on his part, or some danger of loss from his misconduct or negligence, for which he will not be able to answer by reason of his insolvency.

THIS was an appeal from the decision of the Court of Equity of RUTHERFORD, held by *Howard, J.*, at September Term, 1863, refusing to dissolve the injunction heretofore granted.

All the facts upon which the judgment of this Court proceeded are stated in the opinion of the Court.

No counsel for plaintiff.
Moore for defendant.

BATTLE, J. The jurisdiction of the court of equity in cases of the kind before us is undoubted. "But the mere poverty of the executor

does not authorize the court, against the will of the testator, to remove him by putting a receiver in his place. There must be, in addition, some maladministration or some danger of loss from the misconduct or negligence of the executor for which he will not be able to answer by reason of his insolvency. That seems to be the well-settled rule." *Fairbairn v. Fisher,* 57 N. C., 390. Hence, where the condition of the executor in property or credit has not been changed for the worse since the making of the will and the death of the testator, the court will not interfere. Such, it is contended by the counsel for the defendant Harris, is the case with him. He admits in his answer that at the death of his father he had been "unlucky in business" and was embarrassed with debt, but he alleges this circumstance was well known to his father when he appointed him one of his executors, and he avers that (593) his pecuniary condition has somewhat improved since then. If it were true that the full extent of his indebtedness was known to his testator at the time when he appointed him an executor, and also true that his pecuniary embarrassments had not increased since, then the court would not be authorized to remove him, nor to intrefere with his management of the estate. But is that true? We think not. The bill charges that the defendant Harris had, in the lifetime of the testator, been appointed guardian of one Joseph Whiteside, a lunatic, and as such had given a bond to which the testator was one of the sureties, and that since the testator's death it had been ascertained by a committee of the county court, by which the appointment had been made, that he was indebted to his ward in the sum of $10,000. This allegation is admitted in the answer, yet the defendant does not say that he has the assets of his ward in his hands ready to be accounted for, or that he has funds of his own wherewith to pay off the debt. He states only that there were good sureties besides his father to the guardian bond. The plain inference from these admissions and statements is that he had wasted or misapplied the effects of his ward, and was unable to make good his default. This very bad condition of his affairs does not seem to have been known to his father, and, having come to light since the testator's death, fully justified the court below in refusing to dissolve the injunction, from which the appeal is taken. As the case comes before us upon an appeal from an interlocutory order, and as we do not discover any error in that order, we can only affirm it, and send a certificate to that effect to the court where the cause is still pending. Any motions for a change of the order made in the court below must be addressed to that court. (594)

Cited: Camp v. Pittman, 90 N. C., 618.

NOTE.—Where an executor had remained in office as such for twenty years, and had never made a return: *Held*, he was properly removed from his office. *Armstrong v. Stowe*, 77 N. C., 360. The insolvency of an executor is not a sufficient cause for requiring him to give bond, and, failing in that, for removal, unless such insolvency was unknown to the testator or occurred after his death. *Neighbors v. Hamlin*, 78 N. C., 42.

J. W. CONLY, ADMINISTRATOR, AND OTHERS v. JOHN KINCAID AND OTHERS.

(Winst. Eq., 44.)

1. A testator gives to his wife real and personal property for life, and directs that at her death it should all, real and personal, be sold and the money equally divided among his children. *Held*, that by the direction to sell the land is converted into personalty.

2. One of the daughters of the testator died after the testator, in the lifetime of his widow, leaving a husband surviving. *Held*, that as her administrator he is entitled to one-seventh of the money arising from the sale of the property given to the widow for life.

ROBERT KINCAID, by his will, gave real and personal property to his wife for life or widowhood, the real property being land owned in fee by the testator, and made divers dispositions thereof, to take effect after the death or second marriage of his widow. Afterwards in 1836, he made a codicil, by which he gave to his wife a negro girl named Adeline, during her life, and at her death Adeline and her offspring, together with Alfred, and the plantation left to his wife, are to be sold for the most that can be got for them at public sale, "and equally divided between my seven children named in this will." "And further, I will and bequeath to my wife during her life my negro woman
(595) Sue, and at her death said woman Sue to be sold and the money divided equally between my children aforesaid." Patsy, the deceased wife of the plaintiff John Conly, was a child of the testator, and one of the seven named in the will. She died after the testator, in the lifetime of the testator's widow, and her husband is her administrator.

Merrimon for plaintiff.
No counsel for defendant.

BATTLE, J. The direction in the will of Robert Kincaid, that upon the death of his wife the land and negroes which he had given to her for life should be sold and the proceeds equally divided among his seven named children, had the effect to convert the real estate into personalty,

and in the events which have happened the plaintiff J. W. Conly is entitled to one share, as the representative of his first wife, Patsey. *Powell v. Powell,* 41 N. C., 50; Adams Eq., 150. Patsey had a vested interest in the property given to her mother for life, which upon her death in the lifetime of her mother belonged to her husband as her administrator.

This doctrine is so well settled that it is unnecessary to enter into a further discussion of it.

Cited: Falls v. McCulloch, 62 N. C., 140; *Kincade v. Conley,* 64 N. C., 390; *Benbow v. Moore,* 114 N. C., 270.

NOTE.—*Vide Britton v. Miller,* 63 N. C., 268; *Sutton v. West,* 77 N. C., 429. A legacy of property, "to be sold at my wife's death and equally divided among all my children," is *vested;* and therefore the representatives of such children as survived the testator and died before the wife are entitled to shares. *Falls v. McCulloch,* 62 N. C., 140; see *Kincade v. Conley,* 64 N. C., 387.

DAVID GARROW, ADMINISTRATOR OF JESSE WHITAKER, v. JOHN E. BROWN AND OTHERS.

(Winst. Eq., 46.)

Equity will annul a contract for the purchase of land by a man whose mental faculties are greatly impaired, at a price double its value, obtained from him when he was deprived of the counsel of his friends, by the fraudulent practice of the vendor.

THE bill was filed in the Court of Equity for BUMCOMBE, by the (596) administrator of Jesse Whitaker, to annul a contract made by the intestate shortly before his death, for the purchase of a tract of land to be conveyed to him by the defendant William E. Brown, in consideration of certain notes and bonds which were to be delivered to the vendor, and a sum of money. One of the bonds had been delivered to the vendor. The facts of the case are stated in the opinion of the Court.

Merrimon for plaintiff.

MANLY, J. If the case stood alone upon the mental incapacity of Jesse Whitaker, deceased, we might feel constrained to send it to a jury to have an issue on that point tried.

It seems an inquisition was had in Buncombe, according to the usages of law, which resulted in a verdict that the subject was *non compos*

mentis, which was reported to the county court at its April Session, 1857. From this there was an appeal to the Superior Court of the county, and this appeal was pending at the time of his death.

The evidence which has been laid before us preponderates, we feel at liberty to say, in favor of the finding of the jury; but as the inquisition was not finally acted upon and settled by a jury upon testimony *viva voce,* it would be more in accordance with the caution with which this Court proceeds in matters of so great importance to send it to the customary tribunal to have the fact established the one way or the other.

But we do not think the case necessarily turns upon this point. There are other well-settled principles of equity which dispose of it.

(597) Whatever may be the degree of doubt left upon the precise mental condition of Jesse Whitaker, about the time of the transactions in question, if he could not at that time be properly classed amongst *non compos mentis* technically, it is nevertheless certain that he was very old, was prostrated by disease and intemperance, and his memory and will, at least, exceedingly uncertain and fluctuating.

He was advised by friends, upon whose counsel he had theretofore relied, not to make the bargain without further information; and it was then understood and agreed, the defendant Brown being present, that no further action should be taken in the matter until the information needed was obtained.

After this arrangement, the friends of Whitaker left the house, and thereupon Brown, having remained, renewed the negotiation and effected the alleged sale of his land.

The further fact in this case is established to our satisfaction, that the price demanded and received for the land is twice its true value.

Here, then, are extreme imbecility of mind in the subject of the alleged fraud, an opportunity selected when he was "without counsel," in fraud of an agreement, secrecy in the transaction, and imposition in the price.

These are sufficient, we think, to call into action the interference and aid of this Court.

This occasion or source of equity jurisdiction is fully explained in *Amis v. Satterfield,* 40 N. C., 173, and *Freeman v. Dwiggins,* 55 N. C., 162.

The voluminous evidence which had been filed in this cause establishes with sufficient clearness the narrative we have given as the true state of the facts, according to the interpretation most favorable to the defendant, and the cases establish the principle that the Court will an-

(598) nul a contract made under such circumstances, and remit the parties, as far as it is practicable to do so, to their previous positions. To this end a decree may be drawn perpetuating the injunctions

heretofore granted, annuling the contract marked A in the papers, and directing a return of such notes, orders, or other securities as were given for the purchase money.

NOTE.—A conveyance will be set aside on account of the exercise of undue influence or of circumvention. *Burroughs v. Jenkins*, 62 N. C., 33; *Elliott v. Logan, id.*, 163; *Hartly v. Estis, id.*, 167; *Earl v. Bryan, id.*, 278; *Hill v. Brewer*, 76 N. C., 124. See, also, *Harshaw v. McCombs*, 63 N. C., 75.

WILLIAM EDWARDS v. JAMES PARKS, JOHN H. CARSON, AND JESSE GAMBLE.

(Winst. Eq., 49.)

1. Payment of the money due on a bill of exchange, promissory note, or bond for the payment of money, negotiable as a bill, etc., by the person liable to pay, to him who has *bona fide* possession of the instrument as a purchaser of it, though without indorsement, discharges the debt.

2. Authority from the husband to his wife to sell a negotiable bond and deliver it to the purchaser may be inferred from circumstances.

THIS was a suit, by bill in equity, to enforce the payment of a negotiable bond payable to the plaintiff, which was in possession of the defendant, the obligor. All the material facts are stated in the opinion of the Court.

Winston, Sr., for plaintiff.
No counsel for defendant.

PEARSON, C. J. The negro girl for whom the note in controversy was given was recovered by the plaintiff in right of his wife, in a suit in Virginia. When the negro was sold, the plaintiff said "she was his wife's property, and she could do what she pleased with her." (599) His wife joins the plaintiff in executing the bill of sale, and the note is *made payable to her and was delivered to her.* There is no proof that the plaintiff ever took the note into his possession, or had anything to do with it; and are satisfied by the pleadings and proofs that the plaintiff's wife traded the note to Gamble for a tract of land, and afterwards assigned her contract to Carson, who paid to her the amount of the note. This dealing by the wife of the plaintiff was done through the agency of Joshua Bracking, who indorsed the note to Gamble, to whom the defendant Parks paid the *full amount.* The allegation of the plaintiff, that he notified Parks not to pay the note *before* he had paid it, is not proved.

The case turns on the validity of the payment made by Parks to Gamble, which is a mere question of *law;* and the plaintiff comes into this Court, not on the ground of an equity against Parks, but on the collateral fact, that the note has, without his concurrence or consent, got into the possession of Parks, whereby the remedy at law is obstructed.

As the plaintiff neglected to notify Parks not to pay the note before he had paid it, and as Parks paid the full amount innocently to Gamble, a *bona fide* holder, having the indorsement of Bracking, a court of equity might hesitate whether it should not decline to interfere, and leave the plaintiff to his remedy at law, if upon the facts the court was of opinion that *strictissimi-juris* the payment was not valid. But we are of opinion that the payment was valid, and the debt thereby discharged.

The legal title to a bill of exchange, promissory note, or bond for the payment of money, negotiable by statute, can only be passed by indorsement; but the *equitable interest* may be acquired by purchase *without indorsement;* and payment to a *bona fide* holder without indorse-
(600) ment, who has purchased the note or bond, and on payment hands it to the obligor, is a valid payment, and discharges the bond.

The possession of the note or bond, connected with the fact that it had been acquired by purchase, is full evidence of an authority to receive the money. This is a matter of every-day occurrence, and when a man presents a note which he has "traded for," although there is no indorsement by the payee, the obligor pays the amount and "lifts the note," as it is usually expressed, on the ground that the possession of a note or bond by one who has purchsed it of the payee is evidence of a power of attorney which authorizes the holder to receive the amount to his own use.

The plaintiff's right to treat the payment by Parks to Gamble, who delivered the bond up to him, as a nullity, is put on the ground that Gamble was not a *bona fide* purchaser, for Bracking had no right to sell the bond. This depends on the fact whether the plaintiff's wife had authorized Bracking to do so, and that depends on the fact whether the plaintiff had made his wife *his agent* in respect to the transaction concerning the negro. So the case is reduced to this, Does the evidence sustain the inference that the plaintiff had, in respect to the slave Beck, and the note executed as a security for the price at which she was sold, expressly or by implication constituted his wife an agent to sell the slave and receive the purchase money? We are satisfied by the evidence that such is the fact. The plaintiff said "the negro woman was his wife's property, and she could do as she pleased with her." The wife joins in the execution of the bill of sale, and the note is made payable to her, and is never taken into his possession. All of which tends to show that

in respect to the negro and the note taken as her price, the plaintiff supposed his wife had a right to do as she pleased, and either expressly or by implication made her his agent to enable her to do so.

The plaintiff has failed to establish his equity. (601)

Bill dismissed.

ALBERT T. SUMMEY, ADMINISTRATOR OF WILLIAM A. PATTON, v. JAMES A. PATTON, WASHINGTON MORRISON, AND SAMUEL G. KERR.

(Winst. Eq., 52.)

1. Where land is purchased in fee by a partnership with partnership funds and for partnership purposes, and one partner dies, upon the settlement of the partnership debts his share of the land descends to his heir, in equity, as at law.

2. And it *seems* that upon a dissolution of the partnership by effluxion of time or otherwise, all the partners then living, the land will be regarded as real estate, as between them, the partnership being solvent.

WILLIAM A. PATTON, Washington Morrison, Samuel G. Kerr, and James A. Patton entered into partnership, in 1860, for the purpose of tanning leather, making shoes, etc., and William A. Patton conveyed to his three partners three-fourths of a piece of land in fee to be used, together with the other fourth part reserved to himself, by the firm, as a tanyard, and it was so used during the existence of the partnership. In 1863 William Patton died, and the plaintiff became his administrator. He filed this bill against the surviving partners for an account, praying among other things that they should pay to him such part of the proceeds of the sale of the tanyard lot as belonged to the estate of the intestate. The defendants submit the question to the Court, whether the money belongs to the heir or administrator of the intestate.

Merrimon for plaintiff.
No counsel for defendants.

PEARSON, C. J. The pleadings present the question whether (602) land purchased by a firm with partnership funds, for partnership purposes, and used as a part of the stock in carrying on the business—a tannery, for instance—in the absence of any agreement in the articles of copartnership, shall on the dissolution of the firm by the death of one of the parties descend as real estate to the heirs at law, or pass as personal estate to the executor or administrator of the deceased partner.

For the purpose of deciding the general principle, we will put out of the case the special circumstance that the intestate W. A. Patton was the owner of the land, and after the formation of the firm conveyed three-fourths of the lot to the other three members of the firm in fee simple, retaining the other fourth, and that the articles of copartnership provide that at its dissolution all the debts shall be first paid out of the joint funds, the capital advanced be returned to each partner, and "the balance of the *partnership assets* shall then be *equally divided* between the four copartners."

It is the settled doctrine of equity in the English courts that as between the partners, and for the purposes of the firm, real estate belonging to the partnership will be treated as personalty, if the partners have by the articles of copartnership or otherwise impressed upon it the character of personalty.

But it is a vexed question whether, after the dissolution of the firm by the death of one of the members, the debts being all settled and no purpose of the firm requiring it, the share of the deceased partner in the land shall still retain its character of personal property and pass to his personal representative, or shall descend as real estate to his heir at law.

Upon this point Mr. Justice Story in his work on Partnership, sec. 93, remarks: "There has been a great diversity of judicial opinion,
(603) as well as of judicial decision, and the doctrine may be considered as open to many distressing doubts."

The idea that *land* shall be considered and treated as personal property is not readily comprehended by a plain mind, and requires explanation. It is an artificial and refined doctrine, adopted by the chancellors in England in reference to copartnerships, on the principle of giving effect to the agreement of the copartners, and originated in this wise: By the common law, on feudal reasons, land could not be sold for the payment of debts. By virtue of legislative enactments, the writ of *elegit* and *statutes merchants and staple* subjected land to the claims of creditors in a modified way, that is, by giving the creditor a right to have the land extended at a yearly value, and to have an estate and receive the rents and profits until, at the extended value, the debt was satisfied. This, however, did not cause land to answer the purposes of trade and become the means of extended credit as fully as if it could be sold out and out like personal property. Again, land held in joint tenancy was subject to the doctrine of survivorship, by which on the death of either tenant the whole estate belonged absolutely to the surviving tenant. This was a great drawback to the formation of copartnerships in which the business made it necessary for the firm to own land. To obviate these difficulties, the articles of copartnership in many instances contained an agreement that the land required and owned as part of the

stock in trade should be considered and treated as personalty, and in others the acts of the parties furnished ground for the inference that it was the intention to impress on land the character of personalty in all such cases; and the courts inclined to extend them by construction and implication. It was held in equity that the agreement and intention of the parties should be carried into effect, and to do so the land must be considered and treated as personalty. This was all well enough and plain sailing, as between the copartners, and for the purpose (604) of the firm, but when it was attempted to carry the principle further, and make it apply to land ater a dissolution by the death of one of the parties, and after the business is closed, so as to disinherit the heir at law, and allow the personal represenative to take the land and dispose of it as personal property, the doctrine became much more refined and too attenuated for practical purposes, and calls for the remark of Mr. Justice Story, that "the doctrine may be considered open to many distressing doubts."

In this State land can be sold out and out, under execution, and the doctrine of the common-law survivorship is abolished. So the two rules of law which gave rise to this doctrine and were the foundation on which it was built have been taken away; and we are inclined to the opinion, under the rule *cessante ratione, cessat lex,* the doctrine is not applicable to the relation of copartners, even between the parties themselves; and we are clearly of opinion that it does not apply as between the heir at law and the personal representative. And in the absence of any adjudication by which it is fixed in our law, we regard it as another of those *refined doctrines* of equity jurisprudence which render the English system so extremely artificial and complicated; and add it to the list of "pin money," "part performance," "the lien of a vendor for the purchase money," "the duty of the purchaser to see to the application of the purchase money," and the wife's equity for a settlement. *McKimmon v. McDonald,* 57 N. C., 1.

There will be a decree declaring that the plaintiff is not entitled to that part of the fund in the hands of the defendants arising from the sale of the tanyard lot.

The cost to be paid by the plaintiff. (605)

Cited: Stroud v. Stroud, 61 N. C., 526; *Mendenhall v. Benbow,* 84 N. C., 650; *Sherrod v. Mayo,* 156 N. C., 148.

DUNCAN F. McIVER AND DANIEL McIVER v. JOHN R. RITTER, THOMAS W. RITTER, A. A. SEAWELL, AND KENNETH H. WORTHY.

(Winst. Eq., 56.)

A writ of *fi. fa.* cannot continue by relation a lien on property created by previous writ, unless it purports on its face to be an *alias*.

THE bill was filed in CHATHAM Court of Equity, alleging that in 1853 the plaintiff purchased a tract of land in Moore County, of Jesse L. Bryan, at a public sale made in that county. That the defendants were present at the sale, and the defendant Worthy, then sheriff of that county, had in his hands at the time an execution in favor of
(606) John R. Ritter against Bryan, issued from the county court, on a judgment obtained in 1851, which Worthy knew to be unsatisfied, but that in order to defraud the plaintiffs, he declared to the people assembled there that the execution was satisfied, and the other defendants heard his declaration and concurred in it for the same fraudulent purpose, thus inducing the plaintiffs to buy. That John R. Ritter, one of the defendants, had obtained a judgment against said Bryan in Moore County Court, in 1851, and executions regularly issued thereon from term to term (and were put into the sheriff's hands), until the land was sold in 1857 by virtue of one then in the sheriff's hands, and John R. Ritter became the purchaser, who afterwards conveyed to Thomas W. Ritter, and he to Seawell. All of the conveyances are charged to have been made for the purpose of defrauding the plaintiffs and obscuring their right and obstructing their remedy; and the plaintiffs insist that the defendants are *trustees* for them. The prayer is, that the "defendants John and Thomas Ritter and Seawell may surrender up said deeds to be canceled," and for such other and further relief, etc.

It appeared that though writs of *fi. fa.* issued from term to term, from the rendition of the judgment until the sale by the sheriff, no one appeared to be an *alias* on its face.

No counsel for plaintiffs.
Phillips for defendants.

MANLY, J. The plaintiffs purchased lands, described in the pleading, of Jesse L. Bryan, at a public sale in December, 1853.

At that time, as they allege, there were executions running upon a judgment against Bryan, obtained in October, 1851. At the sale the defendants (the sheriff, in whose hands were the writs of *fi. fa.*,
(607) combining) fraudulently represented the debts to be satisfied, and thus induced the plaintiffs to buy the land in question.

Notwithstanding the writs of *fi. fa.* were continuously sued out upon the judgment until January, 1857, when there was a levy upon the land,

a sale, and a purchase by Ritter, the plaintiffs charge a fraudulent combination on the part of Ritter and other defendants to encumber their title, and pray to have the cloud removed.

An exemplification of the entire record of the case of *Ritter v. Bryan* has been filed as an exhibit, from which it appears that, although writs of *fi. fa.* were regularly issued from the date of the judgment in 1851 to the sale in 1857, yet none of them purported to be *alias* writs, which we deem necessary in order to keep up a lien. *Yarborough v. Bank,* 13 N. C., 23; *Palmer v. Clark, id.,* 356; *Arrington v. Sledge, id.,* 359, and *Harding v. Spivey,* 30 N. C., 63. The discussion of this matter has generally arisen upon the question whether an *alias* as such would attach as a lien from the test of the original. It seems to have been a conceded point at all times that if it were not an *alias* the lien would not attach.

The law does not tolerate deception in its process, by which purchasers and creditors may be entrapped. If a creditor desires to continue his lien, he must cause the necessary writs to appear truly upon their face what he claims them to be, and each must go into the hands of the sheriff of the county where the property lies.

It has been held when a levy is made under a *fi. fa.,* and a *fi fa,* again issues instead of a *vend. exp.,* the lien is lost. When a *fi. fa.* purports to be an *alias,* but the original did not go into the hands of the sheriff, but was held up by the plaintiff, the lien does not extend beyond the teste of the *alias.* Where the alias and original were sent to different counties, the property not being in the county to which the original was sent, the *alias* was not a lien, except from its own teste. See au- (608) thorities already cited.

It will be seen from these principles that although at the time of the sale to the plaintiffs in 1853 the land was under the lien of a *fi. fa.* from October, 1853, to January, 1854, yet this lien was lost. The execution which issued from January to April, 1854, did not purport to be an *alias,* which was necessary, as we have seen, in order to impart to it efficacy as a lien from the teste of the previous writ. The *fi. fa.* under which the land was sold in 1857 was an original, and did not operate as a lien beyond its own teste.

We hold, therefore, that the title of the plaintiff is not obscured in such wise as to entitle him to call on this Court for aid. He may vindicate his rights in a court of law. The bill must be dismissed, but without costs except as to the defendant Worthy, who is entitled to costs.

Note.—The decree declares "that the defendants have no legal title to the land mentioned in the pleadings, and therefore are not trustees for the plaintiffs." Wherefore, it is ordered, etc., that the bill be dismissed, etc.—*Reporter.*

Under the Code of Civil Procedure an execution does not bind property, but the judgment itself binds land from the docketing, and personal property is bound only from the levy. So it makes no difference now whether an execution is issued as an original or an *alias*.

RACHEL McLANE, Administratrix of WILLIAM H. McLANE, v. JOHN MANNING and Others.

(Winst. Eq., 60.)

1. A person acting as an officer of the law under a judicial order or judgment ought not to be made a party defendant to a bill for an injunction to restrain the execution of such order or judgment.

2. The State courts have no jurisdiction to restrain persons from acting under the orders or judgments of the Confederate courts, unless they have been obtained by fraud. Whether they have jurisdiction then, this Court declines to express any opinion. They have no jurisdiction to review the proceedings of the Confederate courts.

3. The Court cannot give relief on the ground of frauds, unless it be positively and distinctly alleged.

(609) The bill charges that a corporation was created by the General Assembly of this State for the purpose of working the coal and iron mines at Egypt, in Chatham County, by the name of "The Governor's Creek Coal and Iron Manufacturing and Transportation Company"; that they engaged extensively in the business for which they were created, and the original plaintiff, William H. McLane, was employed as mining engineer and manager in 1852, and has continued to act as such until November, 1862, he being also a large shareholder—and the largest shareholder who is a citizen of the Confederate States; that nine-tenths of the stockholders are citizens of the United States; that the company are indebted to him in the sum of $4,870, or thereabouts, for arrears of salary and advances made by him; that suitable buildings had been erected by him by order of the stockholders, for the officers of the company, and that one of them has been occupied by him, by assignment of the company, as a dwelling-house ever since it was built, and is now occupied by him; the plaintiff was served with process from the District Court of the Confederate States for the District of North Carolina to appear at said court to be holden at Goldsboro on .... November, 1861, to make a disclosure of all he knew concerning the company and its affairs; he appeared at court and filed his garnishment. Such proceedings were had that an order was made by the district judge at chambers that the plaintiff should be removed from his office as manager and a successor appointed, and in obedience thereto Manning, the receiver,

appointed J. N. Clegg manager. Clegg was afterwards removed by order of the court, made without notice of any proceeding intended to be had in the matter, and the defendants Brown and Mallett appointed managers. The plaintiff charges that in the proceedings (610) of the District Court the requirements of the sequestration act were not pursued, and that no decree sequestrating the Egypt property has ever been made. He charges that secret information has been given by one of the defendants, not saying which defendant, nor what the information was, nor that it was false, and he also charges that the "defendants Brown and Mallett have from the first court held in November, 1861, to the last of November, 1862, been unceasing in their efforts to have him (the plaintiff) removed, without cause, and solely with the view of being put into the management themselves." The bill contains no other charge or insinuation of fraudulent conduct or bad motives on the part of the defendants. It then charges that an order was made by the District Court at November Term, 1862, that the plaintiff should be turned out of possession of the house in which he dwells, and that notice in due form of law had been given to him that the order would be executed on the Monday next following the day on which the bill was presented to the judge. The prayer is for an injunction.

An injunction was issued in pursuance of the order of a judge in vacation. At the return term the defendants demurred to the bill, and the cause was transferred to this Court by consent.

Pending the suit the plaintiff died, and Rachel McLane, his administratrix, was made plaintiff.

No counsel for plaintiff.
Phillips for defendants.

Battle, J. The fiat for an injunction in this case was made by me in vacation. The application for it was presented under such circumstances as to allow me no time for an examination of the authorities bearing upon the questions involved, and very little opportunity for (611) reflection. Having now had the aid of an argument and of a conference with my brethren, I have, after mature consideration, come to the conclusion with them that the order was improvidently granted and that the demurrer must be sustained and the bill dismissed.

It is necessary for us to notice only one or two of the questions raised by the pleadings, as they are sufficient to dispose of the case.

The defendant Manning, appointed a receiver under an act of the Provisional Congress of the Confederate States, entitled "An act for the sequestration of the estates, property, and effects of alien enemies, and for an indemnity of the citizens of the Confederate States, and persons aiding the same in the existing war with the United States" (see acts of

the third session of the Provisional Congress, No. 269), was only an officer of the law, and was as such improperly made a party defendant, and as to him the bill must therefore be dismissed with costs. *Edney v. King,* 39 N. C., 465; *Lackay v. Curtis,* 41 N. C., 199.

As to the other defendants, Mallett and Brown, if the Court could entertain jurisdiction at all to restrain them from acting under the orders from the Confederate Court, it must be on the ground of fraud practiced by these defendants in obtaining the orders. Now, in this case no such fraud is positively and distinctly charged in the bill. In one place it is said that one of the defendants—whether Mallett, Brown, or Manning is not stated—was a secret informer, but whether the information given was true or false is not alleged. In another part of the bill it is charged that "the defendants Brown and Mallett have, from the first court held in November, 1861, until the last held in November, 1862, been unceasing in their efforts to have him (the plaintiff's intestate) removed without cause, and solely with the view of being (612) put into the mangement themselves." These are rather insinuations of fraud than positive and distinct charges of it, and when taken in connection with the fact that the relief sought is not put upon the ground of fraud, but upon other and different grounds, the Court cannot make that the basis of a decree for relief, where there are no other elements of equity. (See *Witherspoon v. Carmichael,* 41 N. C., 143.)

This Court has no jurisdiction to review the proceedings of the Confederate Court; and without deciding whether it might not restrain parties from availing themselves of its orders or decrees, when obtained by fraud positively charged and proved or admitted, it will not interfere in the absence of such allegations. The demurrer must be sustained and the bill dismissed with costs as to these defendants also.

Cited: Harshaw v. McCombs, 63 N. C., 77; *Gilmer v. Hanks,* 84 N. C., 320; *Stout v. McNeill,* 98 N. C., 3; *Anderson v. Rainey,* 100 N. C., 334.

Note.—It is improper to make a sheriff a party to an order of injunction against process in his hands. *Jarman v. Saunders,* 64 N. C., 367. Conflict of jurisdiction discussed in *S. v. Hoskins,* 77 N. C., 530.

If fraud be the ground of relief, it must be distinctly and positively alleged, and either admitted or supported by proof. *Harshaw v. McCombs,* 63 N. C., 75.

W. G. BOWERS AND WIFE v. EDMUND STRUDWICK AND OTHERS.

(Winst. Eq., 64.)

In taking an account under a decree, which directed that the mortgaged property in possession of the mortgagee should be retained by him in satisfaction of the mortgage debt, at a valuation to be fixed by the clerk, the valuation must be made according to what the property would bring in specie.

IN obedience to the decree made at the hearing of this case at June Term, 1862 (see the report of it, 41 N. C., 283), the clerk made his report, and the defendant excepted because he was charged with the sum for which the slaves would have sold in Confederate notes, as so much money. (613)

Graham for plaintiff.
Phillips for defendant Strudwick.

PEARSON, C. J. The first exception of the defendant is allowed. A debtor cannot, with a good conscience, offer to pay in depreciated notes a debt contracted while the currency was at par, and a creditor is not obliged to receive depreciated notes in payment of his debt. Dr. Strudwick had a right to demand gold and silver, or par funds, in payment of his debt; and if the debt was to be in negroes, it follows as a matter of course that the negroes were to be rated at specie value; otherwise the debtor would be doing indirectly what could not be done directly.

According to the practice in England, a debtor who seeks to redeem must in the first place pay the debt in gold and silver or par funds, and then take the property. In this State, as an indulgence to the debtor, he is allowed to have the property sold, and to take the excess after paying the debt out of the proceeds of the sale. In this case there was no evidence that Dr. Strudwick removed the negroes from the State with a fraudulent intent to evade the plaintiff's right of redemption, but, on the contrary, the court was satisfied that he removed them after the settlement with the other distributees of Dr. Witherspoon and legatees of Mrs. Witherspoon, upon the well-grounded belief that the value of the negroes was not equal to the claims he held on them, and that the right of redemption would never be set up—in fact, that he was obliged to take the negroes in satisfaction of his claims, although the value was not supposed to be equal to the amount. The decretal order directed an account on the basis of charging Dr. Strudwick with (614) the value of the negroes in payment of his claims; which is the same thing as if the negroes had been ordered to be sold and the proceeds applied to the payment of the claims of Dr. Strudwick. Suppose

the order had been that Dr. Strudwick should bring the negroes back to this State for the purpose of a sale, and they had been sold for Confederate notes: Dr. Strudwick would not have been required to take such notes in payment of his claims. He would have had a right to insist on being paid in gold and silver, or par funds. So it comes to the same result, that is, he has a right to insist that he should be charged only with the specie value of the negroes, in the extinguishment of his claims. The specie valuation of the negroes must be at the date of the filing of the bill, when the plaintiff notified the defendant of his intention to set up his right of redemption. It is not necessary to pass on the second and third exceptions, as they are merely in aid of the first.

The exception of the plaintiff is overruled. She was not bound by the settlement made with the other distributees or legatees, and of course she can claim no benefit under it; and as against her, Dr. Strudwick is entitled to hold the land as a purchaser at execution sale. For this reason it was not included in the terms of the reference.

It is proper to say, this case was held under advisement at the last term, not on account of the difficulty of the question of law, but because the Court was not willing, in the condition of things then existing, to *declare by a decree* that Confederate notes were depreciated. That difficulty is now out of the way. It is conceded on all hands, even by the Confederate Government, that its notes are depreciated and much under par.

The clerk will state an account charging the defendant with the value of the slaves in specie at the date the bill was filed.

Decree accordingly.

CASES IN EQUITY

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

DECEMBER TERM, 1864

WILLIAM D. PICKETT AND JOHN L. PICKETT v. DAVID J. SOUTHERLAND AND OTHERS.

(Winst. Eq., 68.)

A bequest in these words (after a bequest to A., a daughter of Mary Pickett), "I give and bequeath to all the rest of my nieces, Mary Pickett's children, that she now has or may hereafter have, Maria and Jim to share equally, the above negroes to remain in the hands, etc.," Mary Pickett having, at the same time when the will was made, no other daughter than A., but two sons, is a gift to all the *children* of Mary Pickett which she then had (except A.) or might at any time thereafter have, whether in the lifetime of the testatrix or after her death.

THIS cause was removed from the Court of Equity of DUPLIN to this Court for trial.

Mary Rhodes died in 1832, having a short time before made (616) her will, by which she gave to Mary Jane Pickett, the daughter of the testatrix's niece, Mary Pickett, some property; and then bequeathed as follows: "I give to all the rest of my nieces, Mary Pickett's children, that she now has, or may hereafter have, Maria and Jim to share equally, the above negroes to remain in the hands of the manager of my will," etc.

When the will was made, Mary Pickett had three children, Mary Jane and two sons. No others were born during the life of the testatrix; but after the testatrix's death she had five children, some of each sex.

The words and the punctuation of the will are copied with exactness in the foregoing quotation.

The plaintiffs are the survivors of the two sons of Mary Pickett, who were in existence when the will was made, and the administrator of the other, who died after testatrix's death. They claim the whole of the legacy, on the ground that the word "nieces" should be read as if written niece's, and the words "she may hereafter have" should be construed as if the words "during my lifetime" were added. The defendants are the children of Mary Pickett, born after the death of the testatrix. The sons claim that the legacy should be divided among all the children of Mary Pickett; the daughters claim the whole legacy by force of the word *nieces*. Mary Pickett was the niece of the testatrix, and is so described in a preceding part of the will.

Strong for plaintiffs.
No counsel for defendants.

PEARSON, C. J. By its proper construction, the clause in the will of Mary Rhodes which has given rise to this controversy should read: "I give and bequeath to all the rest of the children of my niece, Mary Pickett, as well those she may hereafter have as those she now has, two slaves, Maria and Jim, to share equally."

(617) This removes all obscurity, and by it all of the children (except Mary Jane) as well males as females, and as well those born after the death of the testatrix as those born before, are entitled to a share. *Shinn v. Motley,* 56 N. C., 491; *Shull v. Johnson,* 55 N. C., 202, are directly in point, and the question in regard to after-born children, when there is an express intention to include them, although there be no intervening estate, is fully explained.

Decree accordingly. Costs to be paid out of the fund.

NOTE.—Where a legacy is given to a class, as to the children of A., with no preceding estate, such only as can answer at the death of the testator can take, for the ownership is then to be fixed, and the estate must devolve upon those who answer the description. When, however, there is a preceding life estate, so that the ownership is filled for the time, and there is no absolute necessity to make a peremptory call for the taking of the ultimate estate, the matter is left open until the determination of the life estate, with a view of taking in as many objects of the testator's bounty as come within the description and then answer to the call, when it is necessary for the ownership to devolve and be fixed. *Walker v. Johnston,* 70 N. C., 576.

JOSEPH A. WORTH, THOMAS S. LUTTERLOH, AND AUGUSTUS W. STEEL v. THE COMMISSIONERS OF FAYETTEVILLE.

(Winst. Eq., 70.)

1. A court of equity will entertain a bill against a municipal corporation for the purpose of trying the legality of a tax imposed by the corporation.

2. The General Assembly may authorize a municipal corporation to lay taxes on the town property, the persons, and subjects of taxation incident to the person, of those who have a business residence in town, though they have a residence also out of town.

THIS was a suit brought in the Court of Equity of CUMBERLAND.

The bill states that the plaintiffs have their places of business in the town of Fayetteville, and reside with their families in the county of Cumberland, in the neighborhood of said town. The plaintiff (618) Worth is a commission merchant, and agent of the Cape Fear Steamboat Company. The corporation demands from him a tax on money on hand, dividends received from money invested in steamboat company, salary as steamboat agent, and a riding vehicle. The plaintiff Lutterloh is a merchant, and the owner of a steamboat plying between Fayetteville and Wilmington. The corporation demands from him a tax on money on hand, capital in steamboat company, riding vehicle, State bond, money in Beaver Creek Cotton Factory, located out of town, and dividends received from money invested in that factory. The plaintiff Steel is a merchant. The tax demanded from him is on some of the articles above mentioned.

The bill charges that the right to tax the plaintiffs in respect to these articles is founded on an act of the General Assembly ratified on 28 May, 1864, entitled "An act to enlarge the powers of the mayor and commissioners of the town of Fayetteville," the fourth section of which enacts, "That the mayor and commissioners of the town of Fayetteville be and they are hereby empowered to impose the same taxes, for municipal purposes, upon all persons whose ordinary avocations are pursued within the corporate limits of the town, although residents beyond the corporate limits, in like manner and to the same extent as upon persons resident within the corporate limits: *Provided,* that nonresidents thus taxed shall have the right to vote at municipal elections"; and the act of 1862-'63, ch. 19, entitled "An act to enable all the incorporated towns in this State to lay additional taxes."

The bill was filed by the plaintiffs on behalf of themselves and others having the same interest.

The prayer of the bill was for an injunction.

The defendant demurred, and the cause was removed to this (619) Court for argument.

Moore for plaintiffs.
Winston, Sr., for defendant.

PEARSON, C. J. The Court has had great difficulty on the question of jurisdiction. In this State the courts of law and the courts of equity are held by the same persons, and there is a strong tendency to disregard the distinction between questions of law and equity, and to allow the jurisdiction of the courts to run into each other and become confounded; that is especially so when, as in this case, both parties wish to get a speedy adjudication, and the defendants waive all objections so as to put on the court the duty of raising the question as to jurisdiction and the burthen of deciding it, without the aid of an argument on both sides. *Manly v. Raleigh,* 57 N. C., 370, was a case like this: Both parties wished a speedy adjudication; the question was not raised, and passed *sub silentio;* but that case is now relied on to sustain the jurisdiction of a court of equity to determine on an injunction bill "a dry question of law." It is admitted the question could be presented in a court of law by paying the tax under protest, and bringing an action for money had and received; but it is said, according to the mode of proceeding at law, every taxpayer must bring a separate action, and it is necessary that jurisdiction should be assumed in equity to prevent the "multiplicity of suits." That is a head of equity jurisdiction under which the Court has in some special instances interfered by injunction, and as *Manly v. Raleigh* was a bill against a municipal corporation, and not against its tax collector, and is a precedent directly applicable to the present bill, we have concluded to act upon it, and take the jurisdiction. No injury can
(620) result, for if the operations of a corporation are likely to be seriously impeded by having its sources of revenue stopped, it may insist on an injunction bond being filed, and it will become the duty of the court to require a bond large enough for full indemnity, and it is apprehended that the few who file bills for themselves and "on behalf of all others in like condition" will not be willing to bind themselves to answer the whole default for the sake of raising an equity on the ground of avoiding "the multiplicity of suits." We take occasion to say, in order to "exclude a conclusion," that this decision is confined to bills against *municipal corporations,* and will not be considered an authority to sustain an injunction bill against tax collectors of the Confederate States, or of the State or of a county. That subject involves other and far graver considerations, which are left open, and in respect to which we do not wish to be at all committed. I will suggest one or two:

1. An injunction against tax collectors, the effect of which is to stop all collections, might seriously obstruct the operations of the Government—a consequence in comparison with which the notion of preventing

a multiplicity of suits sinks into insignificance, and which consequence is avoided when the taxes are paid to the collectors under protest, and he pays them over to the Government, taking its indemnity in respect to such actions as may be brought against him.

2. Equity acts *in personam,* and enforces its orders and decrees by process of contempt. When one having judgment at law is about to use it against conscience, a bill is not entertained against the court of law or the sheriff, but against the party to the action; an injunction goes against him and he is put in contempt for disobeying it. A bill cannot be entertained against the Government, and it would seem it ought not to be entertained against the officer of the Government; for, should he be enjoined, he cannot be put into contempt, for he cannot obey the order of the court unless he violates his sworn duty and is guilty of direct disobedience to the orders of the Government of which he is (621) an officer.

3. A court of equity has no machinery and no officers by which it can enforce its orders against an officer of the Government. For illustration: Suppose a bill to be entertained against a sheriff, and he is enjoined from the collection of taxes, the copy, subpœna and fiat are handed to him (say by the clerk); he disobeys the order. What officer has the court by whom the sheriff can be taken into custody and brought before it for the alleged contempt? Who is to call out the *posse comitatus?* I will pursue the subject no further.

On the question presented by the bill we have had but little difficulty. By the proper construction of section 4 of the act of May, 1864, the taxes which may be imposed upon all persons whose ordinary avocations are pursued within the corporate limits of the town, although resident beyond the corporate limits, are restricted to property owned by them in the town, and to their persons, and *subjects incident to their persons.* The only question made is in regard to the latter, when one has a business residence in town, which is the meaning of the description, "persons whose ordinary avocations are pursued within the corporate limits." The money he has on hand, the salary which he earns there, the income which he receives there, whether it be interest on bonds, the debtors residing elsewhere, or dividends on stock in a factory situate out of town, or in a steamboat company, are subjects incident to his person; and in respect to the particulars enumerated by the three gentlemen who filed this bill, we do not see that the commissioners have exceeded the power given them by the act. We understand the "riding vehicle" to mean the buggy used to come into town every morning and go out every night, and consider it adjunct to their town residence, and incident to its enjoyment. In respect to the other gentlemen in behalf of whom the bill

(622) is filed, the allegations are not sufficiently distinct to enable us to express an opinion. The question, then, is narrowed to this: Had the Legislature power to authorize the mayor and commissioners to impose such a tax on persons who transact their business and live in town during the day and live in the country during the night?

It was earnestly contended by Mr. Moore that the Legislature has no power to authorize the imposition of such a tax upon strangers who may occasionally visit the town. That question is not presented by the case; for although the act refers to these gentlemen as persons resident beyond the corporate limits, in contradistinction to persons resident within the corporate limits, it also refers to them as persons whose ordinary *avocations are pursued within the corporate limits,* and the facts being stated at large, the question of residence is left open to be governed by the application of principles of law whereby these gentlemen are put on very different footing from mere strangers. They have two residences, a business residence in town and a domestic residence in its vicinity, and may be called *amphibious* citizens, who enjoy the conveniences and comforts of their double residence. They have the benefit of a town residence for the transaction of business, the advantage of town society for themselves and families, of attending church, sending their children to school, etc., and the benefit of a country residence for cheapness, healthfulness, and the pleasure of country life. They *live in town* nearly if not quite half of the twenty-four hours of every day in the year, and must be considered in part residents of the town. Taking that to be so, there can be no reason on general principles why they should not contribute to the expenses of the town, excluding their country residence and property out of town (which pay no town tax), on the same ground that (623) every man contributes to the expenses of the community in which he lives. The provision which confers on these amphibious citizens the right to vote at municipal elections meets the objection which might otherwise have been made on the footing of the time-honored maxim, "representation and taxation should go together."

Manly v. Raleigh, 57 N. C., 370, cited on the question of jurisdiction, is an authority in support of the power of the Legislature. It is there held that the Legislature has power to extend the limits of an incorporated town, without the consent of the persons included by the extension. In a general view the act under consideration does in effect the same thing. These gentlemen and their country residences might have been included by extending the limits of the town, whereby all would have become liable to a town tax. The greater includes the less. Perhaps the object has been answered by making them to some purposes citizens of

the town, without the inconvenience of extending its territorial limits. That, however, is not a question of power, but of expediency, with which as a Court we have no concern.

The bill is dismissed.

Cited: Huggins v. Hinson, 61 N. C., 128; *Brodnax v. Groom,* 64 N. C., 246; *Commissioners v. Capehart,* 71 N. C., 160; *R. R. v. Lewis,* 99 N. C., 64; *Mace v. Commissioners, ib.,* 67.

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(624)

MARY TROY, EXECUTRIX OF ROBERT E. TROY, AND ALEXANDER TROY, AN INFANT, WHO SUES BY HIS GUARDIAN, MARY TROY, v. ALEXANDER TROY.

(Winst. Eq., 77.)

1. A gift by will to A. for life, remainder to B. in fee, with a power to A. to sell all or so much of the property as in her judgment may be necessary, vests in A. an estate for her life, with a power of sale *appurtenant* to her life estate.

2. And the expression by the testator, in a subsequent part of his will, of a doubt whether the power of sale would not make A. the absolute owner of the whole estate, and a direction that in case such should be the construction in law, that C. should have the legal estate in fee in the property, in trust, etc., do not convey to C. any estate or interest in the property.

3. The will declares the expense of the education of his son to be a charge on all his property. A. holds the proceeds of sales, made under the power, in trust to pay debts, for her own support, and for the support and education of B.

THIS cause was removed from the Court of Equity of COLUMBUS to this Court for trial.

The bill states that in 1862 Robert E. Troy, the husband of the *feme* plaintiff and the father of the other plaintiff, died, leaving a last will and testament, which has been proved; of which the plaintiff Mary is the executrix. After stating, in substance, the contents of the will, and that the sale of some of the property is necessary to pay the debts of the testator, the bill charges that the defendant sets up a claim to the legal estate in the testator's property and denies the right of the plaintiff Mary to sell; and so obstructs the exercise of the power given to her. The prayer is for a declaration of the rights of the parties, and that the defendant be restrained from setting up any claim to any part of the property, or that he may be declared to be a trustee according to the claim he has made. (625)

The material parts of the will (which is made a part of the bill) are as follows:

"It is my will and desire that all my property and estate of every kind and description shall belong to my beloved wife Mary during the term of her natural life, and at her death to my son Alexander. Should it be necessary, however, in the judgment of my wife, that any of the property, real and personal, should be sold, then I authorize and empower my said wife to sell *all*, or such part thereof as she may think proper, either at public or private sale, for cash or otherwise, and to convey the purchaser an absolute title in fee simple. But if my said wife should marry, this power of disposing of my property shall cease and determine."

"Item. As I have some doubts whether the above disposition of my property would not be construed in law to vest in my wife the entire estate and title, notwithstanding it is expressly limited to her life, I therefore desire, in case the intervention of a trustee be necessary in law to carry into effect the disposition which I have made of my property, that the whole of my said property shall be held by my brother, Alexander Troy, for the purpose of carrying into effect my wish and desire above expressed: that is to say, in trust for my said wife during the term of her natural life, and at her death, in trust for my son, Alexander, or in trust for such person or persons as she may sell any of the property to while she remains a widow, and their heirs forever. But my said brother, Alexander J. Troy, is to be appointed trustee only in case that it should be necessary in law for carrying into effect said provisions."

"It is my will and desire that as soon as practicable after the probate of this my last will and testament, my executor hereinafter named shall procure a bill to be filed in the proper court of equity, for the purpose of having it declared whether or not it be necessary for the inter-
(626) vention of said trustee; which bill shall be removed into the Supreme Court for final hearing."

"Item. In case my wife die or marry before my son arrives at the age of 21 years, or shall have completed his education, then I desire and request that my brother, Alexander J. Troy, shall see that my son, Alexander, shall be properly educated, the expense of which education I will and direct shall be a charge upon the whole of my property, whether my wife be living or not."

The answer admits the facts alleged in the bill. The cause was set for hearing on the bill and answer.

PEARSON, C. J. The will gives an estate to Mrs. Troy for life, with a remainder in fee to the infant son, subject to a power of sale by her in

respect to all and every part of the property, in the event that, in her judgment, it should be necessary. This is a power *appurtenant* to her life estate; and the estate which may be created by its exercise will take effect out of the life estate given to her, as well as out of the remainder.

A power of this description is construed more favorably than a naked power given to a stranger, or a power *appendant,* because, as its exercise will be in derogation of the estate of the person to whom it is given, it is less apt to be resorted to injudiciously than one given to a stranger, or one which does not affect the estate of the person to whom it is given.

From the whole will it is clear the intention of the testator was to confide in the judgment of his wife in respect to the necessity of selling property either to pay his debts or for the support of herself, or for the support and education of their infant son; and for these purposes (as long as she remains unmarried) he gives her as full power to sell as he would have himself if living. There is no reason why this (627) intention should not be allowed to take effect. The apprehension of the testator that, possibly, the power of sale conferred on his wife might be construed "so as to vest in her the absolute title in fee simple" was groundless; for as an estate is expressly limited to her during the term of her natural life, and the remainder in fee is also disposed of, there is no room for construction. It follows that the provisional appointment of a trustee has no legal effect, and the defendant, Alex. J. Troy, has no estate or interest in the property; and these provisions have no other effect than a tendency to show the fullness of the power conferred, and that the object was to give his wife as ample power to sell, if in her judgment it was necessary for the purpose above stated, *as if* she was the absolute owner.

The exercise of the power will vest in the purchaser an estate in fee simple, and he will not be bound to see to the application of the purchase money. That will constitute a fund to be held by Mrs. Troy, in trust for the payment of the debts of her husband, and in trust for the support of herself and the support and education of the infant child. And in such part as may not be required for these purposes she will take a life estate, with the remainder in fee to the child. Like all other trustees, she will be subject to the control of a court of equity in respect to the proper application and management of the trust fund.

There will be a decree declaring the rights of the parties. The costs will be paid by the plaintiff, Mary Troy, out of the assets of the estate.

Cited: Parks v. Robinson, 138 N. C., 271; *Herring v. Williams,* 153 N. C., 235; *s. c.,* 158 N. C., 4, 9, 18; *Mabry v. Brown,* 162 N. C., 221, 223.

(628)

THOMAS C. MILLER, EXECUTOR OF FREDERICK J. HILL, AND OTHERS, v. HENRY A. LONDON AND OTHERS.

(Winst. Eq., 81.)

1. Testator bequeaths slaves to A., B., and C. He directs A., B., and C. to purchase a tract of land, on which the slaves were to live, and to cultivate it. The executors are directed to pay to A., etc., $500 for the purpose of stocking the land.

2. This is a *quasi* emancipation, and is void, independently of the act of 1860, ch. 37.

3. Testator gives to his wife all his slaves except those bequeathed as above stated, and concludes his provision for her by giving her all his "property and estate of kind and description" "which is not hereinbefore or hereinafter excepted or disposed of." This is a special residue, and the slaves intended to be given to A., etc., and the legacies intended for their benefit, belong to the next of kin of the testator (his widow having died) after payment of his debts; for the payment of which they constitute the primary fund.

THIS was a suit removed from the Court of Equity for NEW HANOVER County to this Court for trial.

Dr. Frederick J. Hill died in 1861, having made his will, which has been proved by his executors, of whom the plaintiff Thomas C. Miller is one. The will contains the following disposition: "I will, devise, bequeath, and direct that my executrix and executors hereinafter named purchase in the county of Chatham, North Carolina, 100 acres of land, the location of which I desire my friend, Henry A. London, of Pittsboro, to make, and to be paid for out of my estate. And I give, devise, and bequeth the said 100 acres to my worthy friends, Henry A. London, Frederick S. Davis, William E. Boudinot, and Thomas C. Miller, them and their heirs and assigns; and I also give, devise, and bequeath unto my said friends, etc., my faithful and trusty servant, Charles, and his wife, Louisa, and his son, Jim; and I hereby direct that my executrix and executors pay over to my said friends, etc., out of my estate,

(629) the sum of $500, to be laid out by them in stocking said farm of 100 acres, and that Charles and his wife, Louisa, and their son, Jim, live on said farm and cultivate it."

Another clause of his will is as follows: "I also give, etc., to my wife all my negroes in fee, except Charles and his wife, Louisa, and their son, Jim, hereinbefore disposed of"; and he concludes the provision made for his wife by this clause: "and finally I give, etc., unto my said wife all and every kind and description of property or estate, real, per-

sonal, or mixed, of every kind whatever, of which I may die seized or possessed of, or entitled to, and which is not hereinbefore or hereinafter excepted or disposed of."

The bill was filed for the purpose of having the advice of the court on the parts of the will set out. The answers admitted the facts stated in the bill, and the cause was set for hearing on the bill and answers.

Moore for plaintiffs.
No counsel for defendants.

BATTLE, J. This will was filed by the executors of the late Dr. Frederick J. Hill for the purpose of obtaining the advice and direction of the court as to the true meaning and effect of certain clauses of his will. The case has been fairly presented to us by the plaintiffs' counsel, and we are satisfied that the construction contended for by him is correct.

The bequest in favor of the slaves, mentioned in the pleadings, was manifestly for their *quasi* emancipation, without being carried from the State, and is, therefore, void as being against the often declared policy of the law. See, among other cases, *Lea v. Brown,* 56 N. C., 141. The residuary clause in favor of the testator's wife is shown, by the same case of *Lea v. Brown,* to be a special one, which does not (630) include the slaves nor the legacies intended to be given for their benefit. The effect of this is that the said slaves, and the legacies intended for them, are undisposed of, and go to the next of kin; forming, however, the primary fund for the payment of debts and general legacies. *Kirkpatrick v. Rogers,* 42 N. C., 44; *Swann v. Swann,* 58 N. C., 299.

As the land directed to be provided for the slaves cannot be appropriated for those purposes, it cannot be purchased at all; and this disposes of all the questions asked in relation to it. So far as the money with which the purchase was directed to be made, as well as the money with which it was directed to be stocked, is concerned, it is the same as if the clause was stricken from the will.

The act of 1860, ch. 39, which prohibits the emancipation of slaves by will, need not be invoked in aid of this construction which we have put upon the will, as the result may be the same without it.

A decree may be drawn in accordance with this opinion.

MARGARET H. LANE AND OTHERS v. THOMAS H. LANE, EXECUTOR OF LEVIN LANE.

(Winst. Eq., 84.)

A bequest to grandchildren, or children and grandchildren, *eo nomine*, with a direction for equal division among them, is a gift to them *per capita*.

THIS cause was removed from the Court of Equity of NEW HANOVER. The nature and facts of the case are stated in the opinion of the Court.

(631) *Person for plaintiffs.*
Moore for defendant.

MANLY, J. The bill is filed for the settlement of the estate of Levin Lane, of New Hanover County, and the answer of the executor submits an inquiry in reference to two paragraphs of the will, a proper understanding of which is necessary to enable him to make settlement. The paragraphs are the fifth and sixth, and are in these words:

"5. I give and bequeath unto my grandchildren, the children of my deceased daughters, Eliza, Augusta, Susan, and Virginia, all the rest, residue, and remainder of my negroes, to be equally divided between them, share and share alike, to have and to hold, etc.

"6. It is my will that my plantation be sold by my executors, hereinafter mentioned, and the proceeds of the sale thereof invested for the benefit of my beloved wife, Margaret, during her life; and, upon her death, that the said proceeds be distributed equally between my children, Thomas, Walter, and Margaret, and the children of my deceased daughters, Eliza, Augusta, Susan, and Virginia, share and share alike."

The inquiry is whether, in these paragraphs, the grandchildren take *per capita* or *per stirpes*.

To our minds, the words, in themselves, clearly import a purpose to give *per capita*, and upon an examination of the entire will we find nothing to unsettle this manifest import.

Analogous cases were before this Court in *Hill v. Spruill*, 39 N. C., 244, and *Harris v. Philpot*, 40 N. C., 324, in both of which many auhorities are cited and reviewed. They are decisive of the point that (632) when a bequest is to grandchildren or children and grandchildren, *eo nomine*, with directions that there shall be an equal division among them, they take *per capita* and not *per stirpes*.

The purpose to give to each of the *individuals* embraced by the language an equal share is more clear in the case before us than in any of the cited cases examined by me, by the addition of the words, "share and share alike," which cannot be satisfied except by equality, *per capita*.

Spivey v. Spivey, 37 N. C., 100, does not conflict with the current of authorities. That case turned upon the force of the word "heirs," and more especially upon a plain intent to be gathered from the context of the will, that the heirs spoken of were, as a class, to account, and be accounted to, for advancements; and that in the settlement of that estate they were to be regarded as an unit.

The Court, then, is of opinion that the division directed in the fifth paragraph of the will should be equally among the grandchildren, according to their whole number, alloting to each an aliquot part.

And that the division directed in the sixth paragraph should be made upon the same principle among the children and grandchildren, according to their whole number, alloting to each an aliquot part.

Let a decree be drawn to this effect; the costs to be paid by the executor, out of the estate.

Cited: Thomas v. Lines, 83 N. C., 199; *Culp v. Lee,* 109 N. C., 677.

NOTE.—As to when the division is *per stirpes*, and when *per capita, vide Grandy v. Sawyer,* 62 N. C., 8; *Harper v. Sudderth, ib.*, 279; *Waller v. Forsythe, ib.*, 353; *Britton v. Miller,* 63 N. C., 268; *Tuttle v. Puitt,* 68 N. C., 543.

JOHN W. PATRICK AND FRANKLIN THOMAS v. ELIAS CARR AND HOOKERTON FEMALE INSTITUTE.

(Winst. Eq., 89.)

A court of equity will not entertain a bill by a purchaser of land at execution sale, against the sheriff, to compel him to convey.

THIS was a demurrer to a bill in the Court of Equity for GREENE. The cause was removed to this Court for argument. The object and allegations of the bill are stated in the opinion of the Court.

Strong for defendants.
No counsel for plaintiffs.

PEARSON, C. J. The demurrer raises the question whether the jurisdiction of a court of equity can be invoked to compel a sheriff who has sold land under an execution (the judgment, and execution, and sale being in all respects regular) to execute a deed to the purchaser, who offers and has always been ready to pay the purchase money; in other words, to *compel a sheriff to do his duty.* This has hitherto been considered the exclusive function of the court under whose authority he acted in making the sale. We are at a loss to conceive under what head of

equity this jurisdiction is supposed to be embraced, in the absence of an argument in support of the equity, or of any reference to a precedent for the exercise of the jurisdiction. The purchaser has a plain, and an adequate, and a speedy remedy at law, by putting the sheriff under a rule.

We can see no special ground for the interference of this Court. It is true, the bill alleges that after the sale, and in fraud of it, the execution continued to be issued, the sheriff having made no return of the sale, and thereupon a second sale was made by the new sheriff, at which sale the old sheriff, one of the defendants in this csae, became the pur-
(634) chaser. But there is no allegation that a deed has been executed to the defendant Carr, the old sheriff. We are inclined to the opinion that if a deed had been executed to him by the new sheriff, in completion of the second sale, that would have been a ground for coming into this Court; for thereby the title would have passed to him as an *individual,* which might have rendered it impossible for him to comply with a rule of the court out of which the execution issued, to make title, under his power of sale as *sheriff,* to the plaintiff; and thereby made it necessary to convert him into a trustee, holding the legal title, on the ground that he had acquired it by fraud.

But there is no allegation that there was a deed to him. So he has not acquired the legal title, and there is no ground for equity to assume jurisdiction in order to convert him into a trustee.

Demurrer sustained, and bill dismissed with costs.

Cited: Skinner v. Warren, 81 N. C., 376; *Fox v. Kline,* 85 N. C., 177.

JOHN COLEY, EXECUTOR OF SCARBOROUGH SPIVEY, v. EDMUND BALLANCE AND OTHERS.

(Winst. Eq., 89.)

1. The general rule is that property given to legatees, who die in the lifetime of the testator, falls into the residue.

2. If property be given to A. until B., an infant, arrives at the age of 21, and then to B., and B. dies under the age of 21, in the lifetime of the testator, A. has an estate in it until B. would have been 21 if he had lived.

3. If property be given to two as joint tenants, and one die in the lifetime of the testator, by the operation of our act abolishing survivorship in joint tenancy his share falls into the residue.

(635) THIS cause was removed from the Court of Equity of WAYNE to this Court for trial.

The bill alleges that Scarborough Spivey died in April, 1864, having made her will, of which the plaintiff was appointed executor, and that he has qualified as such.

The material parts of the will are as follows:

1. "I give and devise to Zilpha Ballance one negro woman, named Harriet, to her and her heirs forever."

2. "I give and devise to Ruffin Ballance all the cattle that I have at my death, and their increase, till his son, Tawboro Ballance, arrives at the age of 21 years old; and then I give and devise all the cattle and their increase above named to his son, Tawboro Ballance, and his heirs forever."

3. "I give and devise to Francis Allgood Ballance and Allgood Francis Ballance two beds and bedsteads, to them and their heirs forever."

4. "I give and devise to Ruffin Ballance and Aaron Ballance the residue of my property, of every description, not above mentioned, to them and their heirs forever."

The legatees, Zilpha Ballance, Tawboro Ballance, and Francis Allgood Ballance, died in the lifetime of the testatrix. The plaintiff prays the advice of the court as to the effect of these bequests and the death of the legatees last above named. The answers admit the truth of the facts stated in the bill, and the cause was set for hearing on the bill and answers.

Strong for plaintiff.
No counsel for defendant.

PEARSON, C. J. All of the property embraced in the legacies which lapsed by the death of the legatees falls into the residue. This is the general rule, and there is nothing to take this case out of its application.

2. The cattle and increase fall into the residue, subject to the estate of Ruffin Ballance, until Tawboro would have been 21 years (636) old, if he had lived.

3. The interest of Francis Allgood Ballance in the beds and bedsteads does not survive, but falls into the residue. The effect of the act of the Legislature abolishing survivorship among joint tenants is to change the rule which had in bequests of this kind allowed the whole to pass to the surviving legatee.

Decree according to this opinion; costs to be paid by the executor out of the estate.

Cited: Mabrey v. Stafford, 88 N. C., 604.

NOTE.—Upon the death (before the testator) of a residuary legatee, the real and personal estate given to him lapses for the benefit of the testator's heirs and next of kin. *Robinson v. McIver,* 63 N. C., 645.

SARAH PLOTT v. WILLIAM L. MOODY, EXECUTOR OF AMOS PLOTT.

(Winst. Eq., 91.)

1. A bequest of "all my farming utensils of every description that are not otherwise disposed of" is a gift to the legatee of a wagon used on the farm, and of blacksmith's tools used in doing the work necessary for the farm, and occasionally in doing work for the neighbors, there being in the will no other gift of them specifically, and the will containing no residuary clause, nor any other clause which could pass them.

2. A bequest of "all my present stock of hogs, or that I may have at the time of my death, together with their increase," passes the testator's interest in hogs in his possession at the time of his death, which belonged to the estate of his son, dead intestate and without issue, there being no administration on the son's estate.

THIS was a suit in the Court of Equity for HAYWOOD, removed to this Court, after being set for hearing on bill and answer.

The purpose of the suit as to have a settlement of the estate of Amos Plott.

(637) The only controversy was on the construction of two clauses in the will of Plott.

The opinion of the Court contains a statement of everything relating to the questions decided.

Merrimon for plaintiff.
W. H. Bailey for defendant.

MANLY, J. The bill is filed by the widow of Amos Plott, demanding settlement of her husband's estate. The executor seems to be desirous of making a settlement, but they entertain conflicting views of the disposition which has been made of certain property; and the case is brought to this Court to obtain a construction of the will.

In the fifth clause of his will the testator gives to his wife "all my farming utensils of every description, together with my steel traps and guns, that are not otherwise disposed of." And the question is, whether a *wagon* used on the farm, and blacksmith's tools used in the same way generally, and occasionally in working for neighbors, are embraced in the act. In looking into the will, we find these articles are not *"otherwise disposed of,"* either specifically or by such general terms as could possibly pass them. There is no residuary clause; so that if the articles in question are not embraced in the clause under consideration, there must be an *intestacy* as to them.

A person who undertakes to dispose of his property by will is presumed to intend a complete disposition, unless the contrary be manifest. With-

out, therefore, deciding the force and effect *ex vi termini* of the words "farming utensils," or the extent of their application in other connections or cases, we think in this they embrace the wagon and smith's tools. The words are, at any rate, not of such import as to overrule a manifest intent. And the intent must therefore determine the application. This point seems to have been under consideration in the construction of the will of James P. Doggett (*Elliott v. Poston,* 57 N. C., 433), where it was decided that a wagon would pass under the term *"farming* (638) *utensils,"* nothing appearing to show a different intent.

In the sixth clause he gives to his wife "all my present stock of hogs, or that I may have at the time of my death, together with their increase." It seems that amongst his lot of hogs were a number which had belonged to testator's son, Vernon Plott, then deceased. These he had taken possession of, claiming them as his own as next of kin and distributee of his son; but no administration had at that time been taken. Since the death of the father, administration of the son's effects has been granted to the defendant. The question made is, whether the hogs belonging to the son's estate pass by the bequest in the sixth clause. We think this is a plain matter. It was obviously the intention of the testator to give to his wife all the hogs of which he was in possession, and to which he set up a claim, at the time of his death; and *all,* we think, will pass by the terms of the will. Of course, the testator could only transfer such rights as he had; and as his right to a portion of the hogs was subject to such powers as an administrator might previously exercise in relation thereto, the wife took, under the bequest, no more than a right to call on the administrator for the hogs or their value. It can make no difference, it seems to us, whether the right of the testator to the hogs was legal or equitable; that right, whatever it was, would pass.

Having thus decided the rights of the respective parties in the matters of controversy, we suppose they can have no difficulty in settling the estate.

There may be a decree declaring their rights, and, if either party desires it, a decree for an account; costs to be paid out of the estate.

(639)

WALTER P. CALDWELL AND OTHERS v. LEONIDAS COWAN AND ROBERT Z. COWAN.

(Winst. Eq., 94.)

None can take a distributive share of an intestate's estate, with his next of kin, by force of the act of 1862-3, ch. 49, but those who, by representing an ancestor, can put themselves in the same degree of kindred to the intestate as his next of kin.

THIS cause was removed from the Court of Equity of ROWAN to this Court.

The purpose of the suit was to have a distribution of the personal estate of J. Pinckney Cowan, who died intestate in May, 1863. The plaintiffs are the brother and sister of the intestate's mother, the sisters of his father, the grandchild of a deceased brother of the intestate's father, and the children of deceased sisters of his father, who claimed a right to distributive shares with the defendants, who are the children of a deceased brother of the intestate.

Sharpe for plaintiffs.
Boyden for defendants.

PEARSON, C. J. The act of 1862-'3, ch. 49, ratified 12 February, 1863, which repeals the proviso of section 2 of the Statute of Distributions, "In the distribution of the estates of intestates there shall be admitted among collateral kindred no representation after brothers' and sisters' children" (Revised Code, ch. 64), will, in cases to which it has application, make a very important change in a long established rule of law, and let in remote kindred who have heretofore been excluded for the purpose of avoiding the inconvenience of splitting up estates of personal property into so many parts.

This change in the law is only made when, by the right of representation, and taking the place of an ancestor, a party can bring him-
(640) self up to an equality with others who claim the estate. For instance, if there be a brother, or children of a deceased brother, and *grandchildren* of another deceased brother, the latter will, by this change of the law, be able to bring themselves up to an equality, and take the share their ancestor would have taken if living. So if there be an uncle, and children of a deceased uncle, the latter, although excluded by the old rule, will now take a share by representation.

In the case under consideration there is no change in the law; for the right of representing an ancestor, however remote, will not bring up the other claimants to an equality with the defendants, who are the children

of a deceased brother of the intestate; for by representing their grandfather, who was the father of the intestate, they are in *one degree* of the intestate; whereas none of the others can, by representing any ancestor, bring themselves nearer than two degrees.

Allow the brother and sister of the intestate's mother to represent their father; he was the grandfather of the intestate on the mother's side: that leaves them two degrees removed, if standing in place of their ancestor. Allow the grandson of the intestate's uncle to represent his great, great grandfather; he was the grandfather of the intestate: that leaves him two degrees removed. Or allow the children of intestate's aunts to represent their grandfather; he was the grandfather of intestate: and that leaves them two degrees removed after their right of representation is carried as far as it will reach.

The defendants are, therefore, entitled, being the nearest of kin; and the unlimited right of representing an ancestor cannot, in this instance, aid the other claimants.

Let the bill be dismissed at plaintiffs' costs.

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(641)

DAVID V. McCRACKEN v. JAMES R. LOVE.

(Winst. Eq., 96.)

A statement, in a bill for the sale or partition of lands and an account of the rents and profits received by the defendant, that the defendant "has received the rents and profits and appropriated them to his own use and benefit," does not imply that the defendant is possessed adversely to the plaintiff, and is, therefore, no cause of demurrer.

This cause was removed from the Court of Equity of Haywood to this Court for argument, upon a demurrer to the bill.

So much of the pleadings as is necessary to the understanding of the case is stated in the opinion of the Court.

W. H. Bailey for defendant.
No counsel for plaintiff.

Manly, J. The bill is filed to obtain from the defendant an account of the profits of certain land which, it is alleged, the parties hold as tenants in common; and to obtain a sale, or a division of the same, in accordance with the rights of the parties, which are set forth.

A general demurrer to the bill is put in, which, we are informed, is based upon a supposed allegation in the bill that the defendant is in adverse possession, claiming to be sole seized of the lands.

We have examined the bill, and do not find anything which can bear such an interpretation. The words relied upon are these: "Your orator further showeth that the said James R. Love has received the rents and profits arising from said lands, and has appropriated the same to his own use and benefit."

This is but the common language of one tenant in common, who thinks his cotenant has wronged him by the reception of profits, and by no means implies a denial by the defendant of the plaintiff's interest in the land and rights to any profits.

(642) The defendant may plead that he is sole seized, and thus bring forward the matter which he is endeavoring here to interpose to prevent a partition; but the pleadings are not now in a condition to raise any such point. The demurrer must be overruled, and the defendant required to answer.

ABRAHAM SCOTT v. WILLIAM MOORE AND OTHERS.

(Winst. Eq., 98.)

1. The word "children" in the grant of a remainder, after the death of A., to *her children* living at her death, embraces *grandchildren*, if other parts of the conveyance show that it was the intention of the grantor to provide for grandchildren.

2. An additional reason for this construction is furnished by the fact of such a provision being made in a marriage settlement.

THIS was a cause removed from the Court of Equity of GASTON to this Court for trial.

In 1816 Mary J. Scott, a widow, living in Lincoln County, married John Moore of the State of Georgia. Before the marriage, and in contemplation of it, the parties, together with Logan Henderson, executed a deed of this tenor, viz.: "This indenture triparte, made this 29 July, 1816, between, etc., witnesseth: That whereas a marriage is intended shortly to be had between the said John Moore and Mary Scott, and upon the treaty of the said marriage it was agreed that previously to the marriage Mary Scott should assign and make over the following negroes, with their increase, which are the property of Mary Scott, to Logan Henderson, upon the trusts hereinafter expressed: Now, this in-

denture witnesseth, that in consideration of the intended marriage and in performance of that agreement, Mary Scott does hereby sell and assign to the said Logan Henderson the following negro slaves, to wit, Candis, etc., to hold them upon the trusts and for the inter- (643) ests herein expressed, to wit: that he will permit John Moore and Mary Scott to take into their actual possession the said negro slaves, and possess and use them for their joint lives, and also for and during the life of the survivor of them; and upon the further trust, that immediately after the deaths of John Moore and Mary Scott, he will divide the said slaves and their increase fairly and equally, having regard to their value, among all the *children of the said Mary Scott* that may be *then alive,* share and share alike, as well those children that may be the issue of the intended marriage with the said John Moore; but if it should so happen that there be not any issue of the intended marriage, then the whole of the said negro slaves and their increase to be divided between the present children of Mary Scott; and in case it should so happen that Mary Scott should survive John Moore, the trustee shall permit Mary Scott to dispose of one-half of the negroes and their increase; provided she dispose of them to and among her children that may then be alive, or among the children of such children as may then be alive, or that may be alive at the time she makes such disposition, or to any one of her children or grandchildren; and upon the further trust, in case Mary Scott should survive John Moore, and she should have no child nor grandchild, the negroes and their increase shall be subject to the disposition of Mary Scott by her last will or otherwise; and if she should die without making any disposition of them, the same shall descend to her heirs at law; and if John Moore should survive Mary Scott, and, at the time of his death, there should not be a child or grandchild of Mary Scott then living, the slaves and their increase shall descend to the right heirs of Mary Scott, according to the statute of distribution in the State of North Carolina."

Mrs. Moore, at the time of her marriage with Moore, had one (644) child by her first marriage, the plaintiff. By her second marriage she had two children—Lee Moore and Elizabeth Moore—who survived their father, but died in the lifetime of their mother, leaving children (the defendants) who were alive at the time of her death. Mrs. Moore made no disposition of the property during her second widowhood.

The plaintiff claimed the whole of the property, he being the only *child* of his mother living at her death. The defendants contended that the word *"children,"* in the direction to the trustee how ot dispose of the property on the deaths of Moore and his wife, embraced *grandchildren.*

Henderson, the trustee, never possessed any part of the property, or exercised control over it, and removed from this State many years ago; and it was generally supposed that he died in the State of Tennessee; but that fact had not been ascertained, and the parties had no information whether he died testate or intestate, if he were dead.

Besides special prayers for relief, according to the plaintiff's claim to the whole property, there was a general prayer for such relief as the plaintiff was entitled to under the marriage settlement, in the existing state of facts.

Winston, Sr., for plaintiff.
W. H. Bailey for defendants.

MANLY, J. The object of the bill is to get a construction of the marriage settlement between John Moore and Mary Scott entered into shortly before their intermarriage.

The deed provides that, "after the death of both, the slaves therein conveyed shall be equally divided between all the children of the said Mary Scott that may be then alive, share and share alike, as well former chidren as those born of the intended marriage." It seems the (645) event upon which this disposition is made of the slaves has happened. Both are dead, without making effectual disposition of any of the property, and it remains to be divided according to the deed.

Mary Scott, who was a widow at the time of her intermarriage with Moore, had one child, who survives her, and is the present plaintiff. She had two children by her second marriage, Elizabeth and Lee Moore, both of whom died before her, leaving children. The family of Fites, mentioned as defendants, are the children of Elizabeth, and William and Maria Moore are the children of Lee.

In this condition of the family the question is, whether Abraham Scott, the surviving child, takes the whole, or whether the grandchildren, the children respectively of Elizabeth and Lee, take parts.

A consideration of the whole deed satisfies us that the grandchildren may, according to the manifest intent, come under the designation of children, and take shares. One provision of the deed is, in case the intended wife shall survive, she shall have, with regard to a portion of the negroes, a power to dispose of the same to and among her children and *grandchildren*, at will. Another provision is, in case the wife survives and dies without leaving child or *grandchild*, any disposition which she shall make of the property by will shall be good.

In this last provision there is a necessary implication that if she had, in that contingency, left a grandchild, it would take according to their

understanding of the deed. Both show that grandchildren, as well as children, were in the minds of the parties, and regarded as proper objects to be provided for.

Another consideration may be added, arising out of the particular kind of deed before us. One of the principal objects of a marriage settlement (it seems to be so of this) is to provide for offspring, all of whom must be equally the objects of bounty, as none can have forfeited (646) it or placed himself in a situation to dispense with it. There is the greater reason, therefore, for construing this class of deeds, in case of ambiguity, in such way as to accomplish equal justice amongst offspring and satisfy natural affections.

The Court is of opinion that the grandchildren are embraced within the provision of the deed for children who shall survive; but as they come in upon the principle of representation, they must come in as classes, and take only the shares to which their parents would have been entitled had they survived.

Let a decree be drawn declaring these rights, and appointing commissioners to make division accordingly.

The costs must be paid by plaintiff from the estate.

Dist.: Carson v. Carson, 62 N. C., 59; *Powell v. Morisey,* 98 N. C., 430.

NOTE.—When it appears from other parts of a will that the testator understood the distinction between "children" and issue more remote, grandchildren and great-grandchildren cannot be included in a division directed to be made among children. *Boylan v. Boylan,* 61 N. C., 160.

THOMAS J. WILSON, EXECUTOR OF A. J. STAFFORD, DECEASED, v. CORNELIA S. STAFFORD AND OTHERS.

(Winst. Eq., 103.)

1. A widow's dissent from her husband's will, by which his estate was made a common fund for the support of herself and his children, until her death or marriage, when it was to be divided equally among his children, has the effect of making the personal property divisible among her and the children as if he had died intestate.

2. The administrator of a child, who has died since the testator, is entitled to the share of the deceased child.

3. If property be given by will to the testator's widow for life, with remainder over, and the widow dissent from the will, the remainder immediately vests in possession.

(647) THIS cause was transferred to this Court for trial from the Court of Equity of FORSYTH.

The bill was filed by the plaintiff as executor of A. J. Stafford, and prayed the advice of the court as to the construction and execution of his will.

The material parts of the will are:

"3dly. It is my desire that all such personal property as may not be essentially necessary for the use of my family be sold at public sale, and my lots in Winston, except the one whereon I now reside, if there can be anything like a fair price obtained; if not, to be rented. The other lands, to wit, the Britz place and the Wilson field, to be kept for the benefit of the family, if thought best.

"4thly. It is my will and desire that my family carriage, with the harness, be kept for the use of the family; also two horses, farming tools, etc.; also my negroes to either be hired out or worked on the plantation as thought best; but if either of them should become insolent or unmanageable, then to be sold and the money put at interest for the benefit of my family.

"5thly. I wish all such property to be left with my family that they may think necessary to carry on the business, and nothing to be sold except such as may be of little use and the family make out without it.

"6thly. After this provision for my dear wife and family, if she should think best and proper to marry again, then and in that case I desire that all my property, either real or personal, shall be sold or divided equally between my surviving children, to share and share alike. It is my wish that my children, that are too small to be put at some business, be left with my wife until they are old enough to be put at business of some kind, and not to be permitted to grow up in idleness.

"7thly. I desire, if my estate should appear sufficient, at the age of 21, my sons shall receive $500, if they are steady, etc.

(648) "8thly. It is my will and desire that as long as my beloved wife remains my widow, to be well provided for, and never to want any of the necessaries of life, if there is a sufficiency to make her and family comfortable, but not by any means to be extravagant.

"9thly. It is my will that my daughters receive, at their marriage or full age, the like sum of $500, etc.

"10thly. My desire is that at the marriage of my dear wife, or her death, that all of my money or property of every kind be either sold or divided, as may be agreed upon by my children, to share and share alike; and if any of them should die leaving heirs, for them to receive the share or shares of their deceased parents."

The testator died in 1862, leaving his wife and eight children surviving him. Two of the children have since died under age, and without issue.

The widow dissented from the will, and has had dower assigned her. The testator's personal property consisted of cash on hand, securities for money, seven negroes of unequal ages and values, and various other articles.

The defendant J. M. Stafford is the administrator of one of the deceased children, and the defendant Cornelia is the administratrix of the other.

Phillips for plaintiff.
No counsel for defendants.

BATTLE, J. The main, if not the only, difficulty in the will which is now presented to us for construction has arisen from the dissent of the widow from it. The whole scope of the will prior to the tenth item, in providing for the testator's family, is manifestly framed upon the supposition of the continued existence of his wife as a widow. He foresaw that her death or marriage would entirely derange his (649) plans, and he therefore declares, in the tenth item, that should she die or marry, his desire was that all of his money, and all of his property of every kind, should either be sold or divided, as might be agreed upon by his children, each taking an equal share.

There was another event which might happen, and which if it did occur would as effectually break up his family arrangement as either of the other two, but which he seems not to have anticipated, and therefore made no provision against it. This was the dissent of the widow and her claiming her share of the property as if he had died intestate. The effect of this upon the disposition made for his children in the will must, after the assignment of her dower and the giving her an equal part with the children, of the personal estate, be the same as if she had died or married. The executors must, therefore, proceed to dispose of the property as directed by the tenth clause of the will. The administrator and administratrix of the children who have died since the death of their father will be entitled to their respective shares of the personal estate. The case of *Adams v. Gillespie,* 55 N. C., 244, shows that where there is the legacy of a slave to a wife for life, with remainder, the dissent of the widow will hasten the vesting in possession of the remainder.

The plaintiff may have a decree in accordance with this opinion.

NOTE.—The decree declares that "upon the dissent of Cornelia S. Stafford, the widow of the testator, the personal estate in the hands of the plaintiff as executor became subject to distribution among the widow and next of kin of the testator, *as if he had died intestate.*" And it is adjudged and decreed that "the plaintiff pay her one-ninth part of said estate remaining after pay-

ing the debts of the testator and the costs and charges of administration, to be held by her in her own right, and one other ninth part to be held by her as administratrix," etc. And the cause is retained with liberty to any of the parties to apply for further direction therein.—*Reporter.*

Cited: Baptist University v. Borden, 132 N. C., 485, 506.

(650)

JOHN M. HORAH, ADMINISTRATOR, WITH THE WILL ANNEXED, OF GEORGE HORAH, v. SOPHIA HORAH, WILLIAM H. HORAH, AND OTHERS.

(Winst. Eq., 107.)

1. The personal representative has no right to ask the advice and direction of the court in the settlement of the estate of the deceased, except as to matters in which he is interested *as* executor or administrator.

2. A legatee for life or years is not bound to give a bond for the benefit of remaindermen, unless it is shown that there is danger of the property being wasted or eloigned.

THIS cause was transferred to this Court for trial from the Court of Equity of ROWAN.

The bill was filed by the administrator, with the will annexed, of George Horah against the testator's widow, and his brothers and sisters and the children of deceased brothers and sisters. It sets out a clause of the testator's will by which he gives his estate to his wife, the defendant Sophia, for life, with remainder to the other defendants; and the same clause provides that the defendant James shall have a certain house and lot given to the defendant Sophia, upon his (James) paying to her $4,000; and the bill states that controversies have arisen among the defendants concerning the right of the defendant Sophia to receive property given to her, without giving a bond with surety for the benefit of the remaindermen; and also concerning the right of the *heirs* of James (who is dead) to have the lot on payment of the $4,000; and it is also a matter of controversy between the administrator of James and his heirs, which of them must pay the money. The plaintiff asks the advice and direction of the Court concerning these several matters.

W. H. Bailey for plaintiff.
Blackmer for defendants.

(651) BATTLE, J. This bill has been filed by the administrator, with the will annexed, of the testator, against the devisees and legatees, to obtain the advice and direction of the Court in relation to his duties in the settlement of the estate.

It has been repeatedly declared by the Court that, upon such a bill, it will give no advice and direction upon any matter in which the executor is not interested as such. In the will now before us the whole estate of the testator is given to the widow for life, with certain limitations among the testator's brothers and sisters. The only question asked by the administrator with the will annexed, in which he is interested, is whether the widow can be required to give a bond as a security for the personal estate, which she takes for life only; and it is clearly settled that she cannot. See Williams on Executors, 1, 198. Unless a case of danger can be shown, she can only be called upon to sign and deliver to the executrix an inventory of the articles, admitting their receipt, expressing that she is entitled to them for life, and that afterwards they belong to the remaindermen. The assent of the executor to the legacy for life will vest the interest in remaindermen, which they must take means to protect, should they find that it is likely to be endangered by the act of the tenant for life. So any questions which may arise between the remaindermen as to their respective rights in the property must be settled in a suit among themselves, as the executor will have no interest in it, and will not be allowed to meddle with it.

A decree may be drawn in accordance with this opinion, but the plaintiff must pay the costs, as there was no necessity for his bill.

Cited: Bass v. Bass, 78 N. C., 375; *Whitehead v. Thompson,* 79 N. C., 454.

(652)

ARCHIBALD BAKER v. MARY ANN EVANS, EXECUTRIX OF THOMAS N. McLERAN.

(Winst. Eq., 109.)

The performance of a trust created by a conveyance of property to a trustee for the use of an insolvent person upon an inadequate consideration, or gratuitously, will be enforced against the trustee, at the suit of the *cestui que trust.*

THIS cause was transferred to this Court for trial from the Court of Equity for CUMBERLAND.

The facts are stated in the opinion of the Court.

Leitch for plaintiff.
No counsel for defendant.

MANLY, J. The facts as established by the pleadings and proofs are that the land of complainant being sold under execution for debt, was

purchased by Daniel McMillan for the small sum of $10. The purchaser was afterwards induced, through the representations of neighbors, to compassionate the condition of complainant and to convey the land to Thomas N. McLeran for the consideration of $25, the said McLeran agreeing to hold the land in trust for the benefit of plaintiff. At the same time some other small effects were conveyed in augmentation of the trust fund.

After the lapse of a few years, McLeran concluded, for the more convenient management of the trust property, to sell the land and to hold the proceeds thereafter as an interest-bearing fund. He accordingly sold for $750 and took the bond of the purchaser.

It seems that at the time of the execution sale, and since, down to the time of the sale to McLeran, the complainant was indebted to a larger amount than he could pay.

After the death of McLeran, the validity of the trust being denied by his executrix, complainant filed his bill, setting forth the above
(653) facts and praying for an account of the funds and the paying the balance found to belong to the same into the hands of Geddie, as a trustee.

The answer of the executrix, Mary Ann Evans, does not deny the above state of facts in any material particular, but makes the point, whether an arrangement made as his was, for the ease, favor, and comfort of a debtor, is a trust which will be enforced in the courts.

Such is the case presented, and, upon proper consideration of it, we see no reason why the trust should not be enforced. No injustice has been done to creditors. A *bona fide* and indefeasible title was acquired by McMillan through his purchase, and it was entirely competent for him to do with it as he pleased—to keep it, or to convey it away; to convey it either with or without full consideration, and either with or without conditions or trusts annexed thereto. When, therefore, McMillan responded to the call made on his pity, and assigned over the benefit of his purchase to Baker in such a way as to secure it from seizure by his creditors, he conferred, it is true, a benefit upon the debtor, but did no wrong to the creditor, for it was not at his expense. The advantageous bargain which he assigned over had not been acquired by any covinous or fraudulent contrivance or understanding between the debtor and purchaser. The sale was by execution, and the purchase was in good faith for the purchaser's benefit. That he afterwards changed his mind and made an almost gratuitous conveyance of it for the benefit of complainant, is no discredit, but is a transaction eminently fit to be enforced. There is no rule of law or equity which forbids liberality among men, provided they are liberal with their own, and do no injustice to the rights of others.

Whether the fund may not be reached by creditors upon proper proceedings, instituted for this purpose, we express no opinion, as such question is not now before us. (654)

This Court is of opinion the plaintiff is entitled to an account of the trust fund, to the end that it may be put into the hands of the proper trustee for plaintiff's use.

Let there be a decree for an account.

Cited: Ferguson v. Haas, 64 N. C., 778.

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ACCOUNT.

In taking an account under a decree which directed that the mortgaged property in possession of the mortgagee should be retained by him in satisfaction of the mortgage debt at a valuation to be fixed by the clerk, the valuation must be made according to what the property would bring in specie. *Bowers v. Strudwick*, 612.

ACTION ON THE CASE.

Where it had been made to appear by the plaintiff's testimony that his horse had been injured on a railroad, by the running of a train against the animal, and it was left doubtful, from the defendant's testimony, whether the brakes had been applied to the wheels of the train after the horse was seen on the track, it was *held* that the *prima facie* case of negligence made by the act of 1856, ch. 7, was not repelled. *Clark v. R. R.*, 109.

ADMINISTRATORS. See Executors and Administrators.

AGENCY.

Authority from the husband to his wife, to sell a negotiable bond and deliver it to the purchaser, may be inferred from circumstances. *Edwards v. Parks*, 598.

APPEAL.

1. Where an appeal stood on the docket of the Superior Court for three terms, and at the fourth the appellee moved to dismiss it for some irregularity in the judgment of the county court, it was *held* that all such objections were considered as waived by the delay and acquiescence. *Johnson v. Murchison*, 286.

2. Every court must enforce its own rules; and, therefore, it is not a ground for dismissing an appeal from the Superior Court that the county court failed to enforce a rule made by itself incidentally in the progress of a cause. *Ibid.*, 286.

3. An administrator has a right to appeal from an order of the county court affirming the year's allowance made to the widow. *Saunders v. Russell*, 97.

4. Where, on a petition for the partition of slaves, the county court ordered that partition should be made in certain proportions, and appointed commissioners to make it accordingly, and on an appeal to the Superior Court the order was reversed and the division ordered in different proportions, it was *held* that the Superior Court was not in possession of the whole case, by the appeal, and that a *procedendo* to the county court was proper. *Millsaps v. McLean*, 80.

5. Where the object of a writ of *habeas corpus* is to inquire whether there be probable cause for commitment, the decision on it is not the subject of review by writ of error or *certiorari*. *Walton v. Gatlin*, 310.

APPEAL—*Continued.*

6. Where the question on a writ of *habeas corpus* is concerning the power of the committing magistrate or court, or the legality of the commitment, the weight of authority is in favor of the doctrine that the decision is the subject of review. *Ibid.*, 310.

7. The decision on a writ of *habeas corpus* to free a person from restraint for any other cause than the commission of a criminal offense is a *judgment*, and the subject of review by a writ of error or *certiorari*. *Ibid.*, 310.

8. The Supreme Court has the power to review the action of the Superior Courts, and of the judges in vacation, upon questions of law in all cases under section 10 of the *Habeas Corpus Act*. *Ibid.*, 310.

9. A principal cause of challenge involves matter of law, and the decision upon it in the court below may be reviewed, upon appeal, in the Supreme Court. *Blake v. Harris*, 271.

10. The Superior Court has no jurisdiction to decide whether a deposition be regularly taken, except on appeal from the clerk's decision, in pursuance of sec. 63, ch. 31, Rev. Code, or when it is offered to be read in evidence on a trial; therefore, an appeal under ch. 4, sec. 23, of Rev. Code, from the decision of a judge on that question does not lie to the Supreme Court, unless the record shows that the judge had acquired jurisdiction in one of these two ways. *Hix v. Fisher*, 474.

ARBITRATION AND AWARD.

1. Parol evidence is admissible to show what matters are submitted to arbitration, and what matters are brought to the notice of arbitrators. *Walker v. Walker*, 255.

2. An award is avoided by a mistake in law by an arbitrator as to what is submitted to his decision. *Ibid.*, 255.

ASSAULT AND BATTERY.

1. A husband cannot be convicted of a battery on his wife unless he inflict a permanent injury, or uses such excessive violence or cruelty as indicates malignity or vindictiveness; and it makes no difference that the husband and wife are living separate by agreement. *S. v. Black*, 262.

2. It is not the belief, simply, of a man that he is about to be stricken, which will justify him in striking first, but his belief founded on reasonable grounds of apprehension. *S. v. Bryson*, 476.

3. One who seeks a fight, or provokes another to strike him, cannot justify returning the blow on the ground of self-defense. *Ibid.*, 476.

ATTACHMENT.

A. dies intestate, seized of land in fee simple in this State, which descends to her heir at law resident in another state. His creditors here sue out attachments which are levied on the land, and final judgments are obtained therein and writs of *venditioni exponas* issued. The land is sold by B., the administrator of A., under an order of the county court, for the payment of the debts of the intestate. After payment of them, the administrator is bound in equity to pay the

ATTACHMENT—*Continued.*

residue to the creditors who attached the land, notwithstanding that the administrator has paid it by order of the nonresident debtor to another *bona fide* creditor. *Sloan v. Mendenhall*, 553.

AWARD. See Arbitration and Award.

BAIL.

1. If a sheriff fail to take bail, the plaintiff need not file exceptions nor give notice, to fix him as bail. *Adams v. Jones*, 198.

2. A sheriff fails to take bail when the paper returned by him as a bail bond is so defective and imperfect as to be adjudged not to be such. *Ibid.*, 198.

BEQUEST.

1. A testator in 1819 bequeathed to his daughter a negro woman in the following words: "to her and her heirs of her own body forever; and if none, to return after her death to the rest of my children equally." The limitation over to the testator's other children is not too remote. *Blake v. Page*, 252.

2. A testator devised land and bequeathed personal estate to sundry persons. By a residuary clause he gives all the rest of his estate, real and personal, to his executors, in trust to sell and divide the proceeds among his wife and children. Then follows immediately this clause: "I direct my executors to keep my estate together and not to *hand over* any of the devises or legacies until my existing railroad contracts in Tennessee and North Carolina are completed." *Held*, the last clause has relation only to what is given in the residuary clause. *Patton v. Patton*, 572.

3. Testator by one clause in his will gives to his wife all his property of every species whatever, during her life. Another clause says that any children born during his marriage with his said wife shall be coequal heirs with her. The testator dies without having had any children born during his marriage. *Held*, the wife takes an absolute estate in all his property. *Turner v. Kittrell*, 589.

4. A testator gives to his wife real and personal property for life, and directs that at her death it should all, real and personal, be sold and the money equally divided among his children; it was *Held*, that by the direction to sell, the land is converted into personalty. *Ibid.*, 489.

5. One of the daughters of the testator died after the testator, in the lifetime of his widow, leaving a husband surviving. *Held*, that as her administrator, he is entitled to one-seventh of the money arising from the sale of the property given to the widow for life. *Conly v. Kincaid*, 594.

6. A bequest in these words (after a bequest to A., a daughter of Mary Pickett): "I give and bequeath to all the rest of my nieces, Mary Pickett's children, that she now has, or may hereafter have, Maria and Jim to share equally, the above negroes to remain in the hands, etc.," Mary Pickett having, at the same time when the will was made, no other daughter than A., but two sons, is a gift to all the *children*

BEQUEST—*Continued.*

of Mary Pickett which she then had (except A.) or might at any time thereafter have, whether in the lifetime of the testatrix or after her death. *Pickett v. Southerland*, 215.

7. Testator bequeaths slaves to A., B., and C. He directs A., B., and C. to purchase a tract of land, on which the slaves were to live, and to cultivate it. The executors are directed to pay to A., etc., $500 for the purpose of stocking the land. This is a *quasi* emancipation, and is void, independently of the act of 1860, ch. 37. *Miller v. London*, 628.

8. Testator gives to his wife all his slaves except those bequeathed as above stated, and concludes his provision for her by giving her all his "property and estate of every kind and description" "which is not herebefore or hereafter excepted or disposed of." This is a special residue, and the slaves intended to be given to A., etc., and the legacies intended for their benefit, belongs to the next of kin of the testator (his widow having died), after payment of his debts; for the payment of which they constitute the primary fund. *Ibid.*, 628.

9. A bequest to grandchildren, or children and grandchildren, *eo nomine*, with a direction for equal division among them, is a gift to them *per capita*. *Lane v. Lane*, 630.

10. The general rule is that property given to legatees, who die in the lifetime of the testator, falls into the residue. *Coley v. Ballance*, 634.

11. If property be given to A. until B., an infant, arrives at the age of 21, and then to B., and B. dies under the age of 21, in the lifetime of the testator, A. has an estate in it until B. would have been 21, if he had lived. *Ibid.*, 634.

12. If property be given to two as joint tenants, and one die in the lifetime of the testator, by the operation of our act abolishing survivorship his share falls into the residue. *Ibid.*, 634.

13. A bequest of "all my farming utensils of every description that are not otherwise disposed of" is a gift to the legatee of a wagon used on the farm, and of blacksmith's tools used in doing the work necessary for the farm, and occasionally in doing work for the neighbors; there being in the will no other gift of them specifically, and the will containing no residuary clause, nor any other clause which could pass them. *Plott v. Moody*, 636.

14. A bequest of "all my present stock of hogs, or that I may have at the time of my death, together with their increase," passes the testator's interest in hogs in his possession at the time of his death, which belonged to the estate of his son, dead intestate and without issue, there being no administration on the son's estate. *Ibid.*

15. A widow's dissent from her husband's will, by which his estate was made a common fund for the support of herself and his children until her death or marriage, when it was to be divided equally among his children, has the effect of making the personal property divisible among her and the children as if he had died intestate. *Wilson v. Stafford*, 646.

BEQUEST—*Continued.*

16. The administrator of a child who has died since the testator is entitled to the share of the deceased child. *Ibid.*, 646.

17. If property be given by will to the testator's widow, for life, with remainder over, and the widow dissent from the will, the remainder immediately vests in possession. *Ibid.*, 646.

18. These words in a will, "I give to my daughter Susannah, four slaves, named, etc., to her and her heirs. *Provided, nevertheless*, if the said Susannah die childless, then it is my desire that my son Aaron remove back to this country, and to have them, but not to take them to any other part of the country," do not import a *condition* that Aaron shall return to this country. *Harris v. Hearne*, 481.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. An indorsement of a negotiable bond by the payee, in this form, "Eli Olive for sixty days, 19 November, 1858," imposes no liability on the indorser after the expiration of the limited time. *Johnson v. Olive*, 231.

2. A negotiable bond for a certain sum of money, payable to A. or order, with interest from a day preceding its date, is payable immediately, although it purports to be given for the price of bricks to be delivered at a subsequent day. *Watson v. Bledsoe*, 249.

3. Payment of the money due on a bill of exchange, promissory note, or bond for the payment of money, negotiable as a bill, etc., by the person liable to pay, to him who has *bona fide* possession of the instrument as a purchaser of it, though without indorsement, discharges the debt. *Edwards v. Parks*, 598.

4. Authority from the husband to his wife to sell a negotiable bond and deliver it to the purchaser, may be inferred from circumstances. *Ibid.*, 598.

BURDEN OF PROOF. See Evidence.

BURGLARY.

1. A charge in a bill of indictment that the prisoner committed a burglary by feloniously breaking and entering into the dwelling-house of the prosecutor with intent to steal his goods is supported by proof that his intent was to rob the prosecutor. *S. v. Cody*, 197.

2. If a man breaks and enters into a dwelling-house by night with intent to commit a felony, the crime of burglary is consummated, though after entering the house he desists from an attempt to commit the felony, through fear or because he is resisted. *S. v. McDaniel*, 245.

3. The intent to commit a felony may appear from antecedent circumstances, and if there be a forcible entry into the house in the night, the intent so appearing, it is burglary. *Ibid.*, 245.

4. It is not burglary to break and enter a smokehouse thirty-five steps from a dwelling-house, which has no inclosure around it. *S. v. Jake*, 471.

5. A log cabin belonging to the owner of a tobacco factory, in which the superintendent of the factory usually sleeps, is a dwelling-house in which burglary may be committed. *Ibid.*, 471.

CARTWAY.

1. Where the applicant for a cartway over the land of another has already one or more convenient rights of way over the land of another to the public road or other public place to which he seeks access, his application shall be rejected, and if an order for a cartway has been previously obtained, the cartway will be discontinued on the petition of the owner of the land under sec. 38 of ch. 101, Rev. Code. *Plimmons v. Frisby*, 200.

2. If there be two private ways, though not cartways, leading from the land of a petitioner for a cartway, under ch. 101, sec. 37, Revised Code, to the public road to which he seeks access, and if the petitioner have also by a parol license an unobstructed passage through the lands of a third person to the public road, the petitioner is not entitled to have a cartway laid off for him, unless it appear to the court trying the case that notwithstanding such private ways and license it is "necessary, reasonable, and just" that the petitioner should have it. The inference from evidence tending to show that a way over and through a man's land is a public road may be rebutted by evidence of nonuser for more than twenty years. *Burgwyn v. Lockhart*, 264.

CERTIORARI.

1. Where the object of a writ of *habeas corpus* is to inquire whether there be probable cause for commitment, the decision on it is not the subject of review by a writ of error or *certiorari*. *Walton v. Gatlin*, 310.

2. Where the question on a writ of *habeas corpus* is concerning the power of the commitment, the weight of authority is in favor of the doctrine that the decision is the subject of review. *Ibid.*, 310.

3. The decision of a writ of *habeas corpus* to free a person from restraint for any other cause than the commission of a criminal offense is a *judgment*, and the subject of review by writ of error or *certiorari*. *Ibid.*, 310.

4. The Supreme Court has the power to review the action of the Superior Courts, and of the judges in vacation, upon questions of law in all cases under section 10 of the *Habeas Corpus Act*. *Ibid.*

CLERK.

A clerk can only be proceeded against on motion for a summary judgment for money that has remained in his hands for three years, where he has *admitted money to be due* in the manner prescribed by section 1 of chapter 73, Revised Code. *Summey v. Johnston*, 98.

COMMISSIONERS FOR LOCATING A COUNTY-SEAT.

Where commissioners are appointed by an act of Assembly to "select and determine a site for the permanent seat of justice" in a county, and are directed, when they have selected a site, to give notice thereof to other commissioners appointed by the same act, for the purpose of acquiring title to the site selected, the commissioners for location may make a conditional selection; and if the condition be broken by the owner of the land selected as the site, the commissioners may make a new selection. *Herbert v. Sanderson*, 277.

CONDITION.

These words in a will, "I give to my daughter Susannah four slaves, named, etc., to her and her heirs: *Provided, nevertheless*, if the said Susannah die childless, then it is my desire that my son Aaron remove back to this country, and to have them, but not to take them to any other part of the country," do not import a *condition* that Aaron shall return to this country. *Harris v. Hearne*, 481.

CONFESSION.

Where a person suspected of murder was arrested and brought before a jury of inquest as a witness, and subjected to a rigid examination, it was *held* that this examination was not competent evidence against him on a trial for the offense. *S. v. Young*, 126.

CONSCRIPTION.

1. A person liable to military service, as a conscript, under the act of Congress of April, 1862, and who, by virtue of section 9 of the act, regularly procured a discharge by furnishing a proper substitute, cannot again be enrolled as a conscript under the act of September, 1862. *In re Bryan*, 1.

2. Soldiers who had been "placed in the military service of the Confederate States in the field," under the conscription act of April, 1862, and were so at the time of the passage of the exemption act of 11 October, 1862, were *held* not to be entitled to exemption under that act. *In re Guyer*, 66.

3. But where a blacksmith, after being so enrolled, was at the time of the passage of the exemption act not so placed in service in the field, but was detailed to work on a Government contract, and did so work at his trade, at accustomed wages, not having received any bounty, pay, rations, or clothing up to that time, it was *held* that he was entitled to exemption. *Ibid.*, 66.

4. The conscription act requires that the trade on which the claim of a mechanic to exemption is based shall be his regular occupation and employment, and not that at which he may work occasionally and at odd times. *In re Grantham*, 73.

5. A schoolmaster whose occupation had been suspended for twelve or eighteen months, within the term required for his previous pursuit of the business, is not entitled to an exemption under the act of Congress, passed on 11 October, 1862. *In re Dollahite*, 74.

6. A person who has been *drafted*, and who had put in a substitute that was accepted by the officer appointed to act on that business, was *held* not liable to be conscripted under the act of September, 1862. *In re Ritter*, 76.

7. The circular of the War Department, dated 20 October, 1861, allowing substitutes to be received after the companies were formed and actually in the service, applies, by a liberal construction, to companies while in the condition of being formed and organized or recruited; and when a substitute is received under the latter circumstances several of the formalities for obtaining a discharge become immaterial. *Ibid.*, 76.

CONSCRIPTION—*Continued.*

8. The applicant held, by *Judge Pearson* in vacation, to be exempt from conscription, upon the ground that he was an overseer on a farm where twenty hands or more were worked. *In re Huie*, 165.

9. The applicant held, by *Judge Pearson* in vacation, to be exempt from conscription upon the ground of having fairly and *bona fide* furnished a substitute under the act of Congress, passed for that purpose. *In re Boyden*, 175.

10. The applicant held, by *Judge Pearson* in vacation, liable to military service under the conscription act by becoming a substitute, though he was previously exempt as a minister of the gospel. *In re Curtis*, 180.

11. The applicant was held, by *Judge Pearson* in vacation, to be exempt from conscription upon the ground of his being a militia officer, though he was such in the county of Yadkin, in which county the Governor of the State had ordered that the militia officers should be arrested as conscripts. *In re Fisk*, 186.

12. The applicant was held, by *Judge Pearson* in vacation, to be exempt from conscription, by having put in a substitute, though such substitute was under 18 years of age, and had afterwards arrived at that age, as this transaction occurred before the passage of the conscription act calling into service persons between the ages of 18 and 35. *In re Prince*, 195.

13. The acts of Congress of 5 January and 17 February, 1864, concerning the conscription of the principals who had put substitutes into the military service of the Government, are constitutional and valid. *Gatlin v. Walton*, 325.

14. If a contract was made between the Government and the conscript, by reason of the latter's furnishing a substitute under section 9 of the act of 16 April, 1862, the Government had a right to annul the contract by virtue of the power inherent in all governments whose organic law does not expressly deny to them that power. *Ibid.*, 325.

15. But *it seems* that no contract was made by the Government with the conscript furnishing a substitute. *Ibid.*, 325.

16. A dentist is a physician, within the meaning of the act of Congress, and is exempt from conscription by reason thereof. *In re Hunter*, 372.

17. A conscript who has furnished a substitute under the act of Congress is exempt from military service. He is entitled to be discharged under *habeas corpus*, although after furnishing a substitute he has been forced to serve sixteen months in the army, and is absent from his command without leave when he sues out the writ. *In re Wyrick*, 375.

18. A. was elected and qualified as constable in March, 1863. In April, 1863, he was conscripted, and on 5 May, 1863, was sent to the army, where he served six weeks, receiving bounty. *Held*, that he was exempted as a State officer, under act of Congress of 1 May, 1863, enacted while he was in service. *In re Bradshaw*, 379.

CONSCRIPTION—*Continued.*

19. A soldier in the army, who becomes a mail contractor, is as such exempted from further military service, and should be discharged under *habeas corpus*. *In re Sowers*, 384.

20. An officer in the army who has been reduced to ranks, and thereupon appointed county commissioner, is exempt from military service, and must be discharged from custody as a conscript. The validity of his appointment, on the ground of infancy, can only be impeached by a *quo warranto* or other proceeding in which the matter can be put directly at issue and the office adjudged forfeited or vacated. It cannot be impeached collaterally. *In re Russell*, 388.

21. One who is a local preacher of the Methodist Episcopal Church, South, regularly officiating as such, without salary, but who supports himself by keeping a hotel, is exempt from conscription under act of Congress of 17 February, 1864, as a "minister of religion." *In re Cunninggim*, 392.

22. A substitute never liable to conscription, being over 50 years of age, is not discharged from military service by the conscription of his principal under the act of Congress of 4 January, 1864. *McDaniel v. Trull*, 399.

23. A man between 45 and 50 years old, enrolled as a conscript under the act of Congress of 17 February, 1864, is entitled to a discharge when he becomes 50 years of age. *Kesler v. Brawley*, 402.

24. The Congress of the Confederate States have no power to conscribe an officer of the State; and a policeman of an incorporated town is such a State officer as is exempt from conscription. *Johnson v. Mallett*, 410.

25. The Constitution and laws of the State determine conclusively and exclusively what officers are necessary for the administration of its government. *Ibid.*, 410.

26. The certificate of the Governor of a State is not necessary to entitle a State officer to exemption from conscription. *Ibid.*, 410.

27. A man who has been enrolled as a conscript becomes thereby a soldier in the army of the Confederate States, and his appointment afterwards to an office under the State Government does not entitle him to exemption from military service. *Smith v. Prior*, 417.

28. The Governor's certificate has no effect in such a case, for the person is not an officer, his appointment being void. *Ibid*, 417.

29. One who, as an agriculturist, is exempt from military service in the field, is yet in the service of the Confederate States by force of the act of Congress of 17 February, 1864, sec. 10, clause 4, paragraphs 1, 2, and 3, and, therefore, is not liable to serve in the Home Guard of the State. *Wood v. Bradshaw*, 419.

30. Application for exemption from military service in the field on account of being the owner and manager or overseer of fifteen able-bodied slaves, must have been made in a reasonable time after 1 January, 1864; and it was *held* that an application in the month of November of that year was too late. *White v. Mallett*, 430.

CONSCRIPTION—*Continued.*

31. A person enrolled in March, 1864, under the act of 17 February, of that year, who was under 45 at the time of enrollment, was held bound to serve in the regular army during the war. *Haswell v. Mallett*, 432.

32. A written paper, signed by the enrolling officer, which is in its terms an exemption, is but a furlough or detail, if the officer had no right to grant an exemption. *Ibid.*, 432.

33. Free negroes are compelled to render the services required of them by the act of Congress of 17 February, 1864. Congress has the power to assign conscripts to any branch of the service. If a free negro sells his services for a valuable consideration, by deed, for ninety-nine years, he does not thereby cease to be a free man. *Casey v. Robards*, 434.

34. The appointment to an office, under the State Government, of a citizen of the State who is in the military service of the Confederate States is void; unless, *perhaps*, the office be one recognized by the *Constitution* of the State as essential to its government. *Bridgman v. Mallett*, 500.

35. One who has been enrolled as a conscript is not exempt from military service under the act of 17 February, 1864, by becoming the driver of a mail coach. *Johnson v. Mallett*, 511.

36. A contractor to carry the mail is a civil officer of the Confederate Government, and is, therefore, exempted from service in the Home Guard by the act of the General Assembly passed at the session of July, 1863, ch. 10. *Bringle v. Bradshaw*, 514.

37. A man who was between the ages of 18 and 45 at the date of the passage of the act of 17 February, 1864, and arrives at the age of 45 before he is enrolled, is exempt from the regular service for the war, but is liable to serve in the Senior Reserves. *Goodson v. Caldwell*, 519.

38. A man between the ages of 17 and 50 is exempt from conscription under the act of Congress of 17 February, 1864, by becoming the employee of the editor of a newspaper at any time before enrollment. *Upchurch v. Scott*, 520.

CONSIDERATION.

1. Where a witness, who had an interest in a cause, gives or accepts a release in order to extinguish his interest, which expresses to be given in consideration of a sum of money named therein, it is competent for the other party to ask him whether there was in fact any consideration. *Johnson v. Murchison*, 286.

2. A deed absolute on its face which is intended to operate as a mortgage is void in law. If any part of the consideration of a deed be feigned or fraudulent as to creditors, the whole deed is void as to them. A. and B. were partners in trade in 1851 and 1852; an account is taken in 1857, by which a balance is ascertained to be due to B. In 1855 A. conveys his property to C. without a valuable consideration; the conveyance is void as to B., for he was a creditor of A. from 1852. *Ibid.*, 286.

CONSIDERATION—*Continued.*

3. A deed made with the intent to convey property in discharge of a supposed debt, which in law is not a debt, is void against creditors, although the alienor thought he owed the debt, and made the conveyance in discharge of his supposed legal obligation. *Ibid.*, 286.

CONSTABLE.

1. Where the record of the county court showed that A. was appointed a constable for one year, and it was proved that he acted as such during the year, although the condition of the bond did not express the time for which he was appointed, and although the appointment was not made at the term prescribed by law for such appointments, yet it was *held* that he and his sureties were liable for a breach of the bond occurring within the year. *Shipman v. McMinn*, 122.

2. The provision of section 3 of chapter 78, Revised Code, giving the whole amount of debt as damages for the failure of an officer to collect a claim put into his hands for collection, when the debtor is solvent, only applies to claims within the jurisdiction of a justice of the peace, and does not apply in cases of noncollection of process issuing from court. *McLaurin v. Buchanan*, 91.

CONSTITUTION.

1. Clause 19, section 86, Schedule B, of the act of the General Assembly of 1862-3, imposing a tax of all the net profits above 75 per cent on the cost of production on every person or corporation manufacturing cotton or woolen cloth, etc., is constitutional. *Murchison v. McNeill*, 217.

2. The acts of Congress of 5 January and 17 February, 1864, concerning conscription, are constitutional and valid. *Gatlin v. Walton*, 325.

3. If a contract were made between the Government and the conscript, by the latter furnishing a substitute under section 9 of the act of 16 April, 1862, the Government has a right to annul the contract by virtue of the power inherent in all governments whose organic law does not expressly deny to them that power. The Constitution does not forbid it. *Ibid.*, 325.

CONTRACT.

1. Where the proprietors of a school, on being applied to by a father to receive his sons as scholars, inform him of their willingness to receive them, and send him a statement of their terms, one of which is, "When a place is engaged, the session's charge is considered due, unless the boy be prevented from coming by act of God," and the father by letter expressed his acceptance of the terms, though he does not send his sons to the school, he is liable for a session's board and tuition; the proprietors proving their ability and willingness to comply with the contract on their part. *Bingham v. Richardson*, 215.

2. If there be only one event on which money is to become payable, and there is no adequate means of ascertaining the precise damage that may result to the plaintiff from the breach of the contract, it is competent for the parties to fix a given amount of compensation, in order to avoid the difficulty. *Ibid.*, 215.

CONTRACT—*Continued.*

3. Contracts by the husband with the wife for a valuable consideration will be enforced against his representatives. *Smith v. Smith*, 581.

4. If a contract were made between the Government and the conscript, by the latter furnishing a substitute under section 9 of the act of 16 April, 1862, the Government has a right to annul the contract, by virtue of the power inherent in all governments whose organic law does not expressly deny to them that power. *Gatlin v. Walton*, 325.

5. But *it seems* no contract was made by the Government with the conscript furnishing a substitute. *Ibid.*, 525.

CORPORATION.

The treasurer of the trustees of Davidson College is not a corporation sole; on a bond, therefore, payable to one as such, and his successors, a suit cannot be sustained in the name of a successor. *McDowell v. Hemphill*, 96.

COUNTY-SEAT, COMMISSIONERS FOR LOCATING.

Where commissioners are appointed by an act of assembly to "select and determine a site for the permanent seat of justice" in a county, and are directed, when they shall have selected a site, to give notice thereof to other commissioners appointed by the same act, for the purpose of acquiring title to the site selected, the commissioners for location may make a conditional selection, and if the condition be broken by the owner of the land selected for the site, the commissioners may make a new selection. *Herbert v. Sanderson*, 277.

COVENANT.

Testator gave to his wife a tract of land for her life, and after disposing of several other articles of property and sums of money, says: "All my property that is *not named*, both real and personal, is to be sold and, after paying all my just debts, to be equally divided between my lawful heirs in such a way as to make them all equal." The reversion in the land devised to the wife for life falls in the residue, and must be sold for an equal division. No action can be sustained on a covenant made by one of the heirs who had received more than his share, to secure excess so received by him, until the reversion has been sold. *Cline v. Latimore*, 206.

CREDITOR.

A. died intestate, seized of land in fee in this State, which descended to her heir at law, who resided in another State. His creditors here sued out attachments, which were levied on the land, and final judgments were obtained therein, and writs of *vend. expo.* issued. The land was sold by the administrator of A. under an order of the county court for the payment of the debts of the intestate; it was *held*, that after the payment of such debts, the administrator was bound in equity to pay the residue to the creditors of the heir who attached the land, notwithstanding that he had paid it, by order of the heir, to another of his *bona fide* creditors. *Sloan v. Mendenhall*, 553.

DAMAGES.

1. The provision in section 3 of chapter 78, Revised Code, giving the whole amount of the debt as damages for the failure of a sheriff or constable to collect a claim put into his hands for collection, when the debtor is solvent, applies only to claims within the jurisdiction of a justice of the peace, and does not apply to cases of the noncollection of an execution issuing from court. *McLaurin v. Buchanan*, 91.

2. If there be only one event on which money is to become payable, and there is no adequate means of ascertaining the precise damage that may result to the plaintiff from the breach of the contract, it is competent for the parties to fix upon a given amount of compensation in order to avoid the difficulty. *Bingham v. Richardson*, 205.

DEED.

1. Where a father, by a deed, gave to his daughter a tract of land, and provided that "if the said daughter should die and leave an heir or heirs of her body, in that case, said heirs being her children or child, is to have, occupy, and possess all the property herein given, to them and their heirs forever," it was *held* that the children of the daughter took as purchasers, and that the rule in *Shelley's case* did not apply. *Williams v. Beasley*, 102.

2. Whether the rule in *Shelley's* case would apply where the limitation is to A. for life, remainder to the heirs of her body and their heirs, *quere*. *Ibid.*, 102.

3. Where it is established that the deed offered by one of the parties in ejectment, claiming under the same person with the other, is void, he is not estopped from denying the title of the other party. *McDougall v. McLean*, 120.

4. A deed absolute on its face, which is intended to operate as a mortgage, is void in law as against creditors. *Johnson v. Murchison*, 286.

5. If any part of the consideration of a deed be feigned or fraudulent as to the creditors, the whole deed is void as to them. *Ibid.*

6. A. and B. were partners in trade in 1851 and 1852; an account is taken in 1857, by which a balance is ascertained to be due to B. In 1855, A. conveys his property to C. without a valuable consideration; the conveyance is void as to B., for he was a creditor of A. from 1852. *Ibid.*, 286.

7. A deed made with the intent to convey property in discharge of a supposed debt, which in law is not a debt, is void against creditors, although the alienor thought he owed the debt, and made the conveyance in discharge of his supposed legal obligation. *Ibid.*, 286.

8. A conveyance of property, absolute on its face and declared to be made in payment of a debt, is a mortgage, if the supposed debt be merely an obligation on the part of the vendor to indemnify the vendee against an event which has not happened, and may never happen. *Ibid.*, 286.

9. Where a deed recites that it is made in consideration of good will and affection to A., the wife of B., and the children of A. and B., namely, C., D., etc., *and such as they may have hereafter*, and property is con-

DEED—*Continued.*

veyed by it to B. in trust "for the children aforesaid and such as may be born and begotten by the said B. hereafter": the trust is for the children of A. and B., and the children of B. by an after-taken wife have no interest in the trust property. *Carson v. Carson*, 575.

10. B. having power by the deed to him to advance the children of himself and A. by conveying to them or any of them a portion of the trust property, on 6 January, 1850, conveys to his son John, a child of himself and A., a part of the trust property by way of advancement, as the deed declares, and on the same day John reconveys to B. the same property in consideration of the natural love and affection he bears his half-brother and sister, the children of his father by an after-taken wife, in trust for his half-brother and sister, with power to B. to convey the property to the *cestui que trust* by deed or will, and B. by his will does devise and bequeath the property to his said two children, his will is inoperative, and the children by the last marriage take nothing under the deed from John. *Ibid.*, 575.

DEPOSITION.

The Superior Court has no jurisdiction to decide whether a deposition has been regularly taken, except on appeal from the clerk's decision in pursuance of the Revised Code, ch. 31, sec. 63, or when it is offered to be read in evidence on the trial; hence an appeal under the Revised Code, ch. 4, sec. 23, from the decision of the judge on that question does not lie to the Supreme Court, unless the record shows that the judge had acquired jurisdiction in one of these two ways. *Hix v. Fisher*, 474.

DESERTER.

1. An admission by a defendant, indicted under the act of 1863, for "aiding, assisting, harboring, and maintaining" a deserter, that the person so aided, etc., belonged to Captain Galloway's company in the army; that he had been at defendant's house two or three weeks, and defendant believed he was absent from the army without leave, in the absence of all other proof, is not competent evidence that the person aided, etc., is a soldier in the Army of the Confederate States, or that he is a deserter. *S. v. Lewis*, 300.

2. Whether an indictment under that act must not aver that the person aided, etc., is a soldier in the Army of the Confederate States, as well as that he is a deserter, *quære*. *Ibid.*, 300.

DEVISE.

1. Testator gave to his wife a tract of land for her life, and after disposing of several other articles of property and sums of money, says: "All my property that is *not named*, both real and personal, is to be sold, and, after paying all my just debts, to be equally divided between my lawful heirs in such a way as to make them all equal." The reversion in the land devised to the wife for life falls into the residue, and must be sold for an equal division. *Cline v. Latimore*, 206.

2. No action can be sustained on a covenant made by one of the heirs who had received more than his share, to secure the excess so received by him, until the reversion has been sold. *Ibid.*, 206.

DEVISE—*Continued.*

3. A devise of a tract of land to the son of the testator, "if he be living and returns to the county of Orange," is a gift of the land on condition that the son returns to Orange as his domicil, especially when other provisions of the will seem to show the testator's expectation and desire that the son should reside there after testator's decease. *Reeves v. Craig*, 208.

4. Whenever a testator shows an intention to dispose of all his property, and uses words sufficient for that purpose, any estates to which he is entitled in reversion will pass. *Page v. Atkins*, 268.

5. Testator gave a tract of land to his wife, and after several bequests of money and specific legacies says: "My desire is that all the property that I have not willed away shall be sold after my death and equally divided between my six children," etc.: *Held*, that the reversion in the land after the end of the widow's estate for life passes by the residuary clause. Until the sale, the reversion descends to the heirs at law, and this whether the sale is to be made by the heirs or by the executor. *Ibid.*, 268.

6. A devise "to Alexander Riley, for him and his mother and the rest of the children to live on until the youngest becomes of age," is a gift of the fee simple to A. R. *Riley v. Buchanan*, 279.

7. A testator devised land and bequeathed personal estate to sundry persons. By a residuary clause he gives all the rest of his estate, real and personal, to his executors, in trust to sell and divide the proceeds among his wife and children. Then follows immediately this clause: "I direct my executors to keep my estate together, and not to *hand over* any of the devises or legacies until my existing contracts in Tennessee and North Carolina are completed." *Held*, the last clause has relation only to what is given in the residuary clause. *Patton v. Patton*, 572.

8. Testator by one clause in his will gives to his wife all his property of every species whatever, during her life. Another clause says that any children born during his marriage with his said wife shall be coequal heirs with her. The testator dies without having had any children born during his marriage. *Held*, the wife takes an absolute estate in all his property. *Turner v. Kittrell*, 589.

9. A testator gives to his wife real and personal property for life, and directs that at her death it should all, real and personal, be sold, and the money equally divided among his children. *Held*, that by the direction to sell, the land is converted into personalty. *Conly v. Kincaid*, 594.

10. One of the daughters of the testator died after the testator, in the lifetime of his widow, leaving a husband surviving. *Held*, that as her administrator, he is entitled to one-seventh of the money arising from the sale of the property given to the widow for life. *Ibid.*, 594.

DISTILLING.

1. A person who leases his still-house and still, knowing that the lessee takes them for the purpose of distilling spirits from corn, which pur-

DISTILLING—*Continued.*

pose is accomplished by the lease, is not guilty of a violation of the act forbidding the distillation of spirits from corn, if he has no interest in the liquor distilled. *S. v. Summey*, 496.

2. Liquor obtained by running the beer once through the still is "*spirituous liquor*" within the meaning of the act. *Ibid.*, 496.

DISTRIBUTION.

No person can take distributive share of an intestate's personal estate with his next of kin, by force of the act of 1862-'3, ch. 49, but one who by representing an ancestor can put himself in the same degree of kindred to the intestate as his next of kin. *Caldwell v Cowan*, 639.

DOWER.

1. Where real estate of an inheritance is purchased by a partnership, for partnership purposes, and is so used, on the death of one of the partners, his widow is entitled to dower. *Patton v. Patton*, 572.

2. The widow of a deceased vendee of land, who has paid the purchase money, may by a bill against the heirs of her late husband and the heirs of the vendor compel a conveyance of the land by the heirs of the vendor to the heirs of the vendee, and an assignment of dower to herself. *Smith v. Smith*, 581.

EJECTMENT.

1. A judgment that the defendant recover his costs from the lessor of the plaintiff in an action of ejectment, where the plaintiff failed in the suit, and an execution of *fieri facias* issued thereon, were held to be proper. *Blount v. Wright*, 89.

2. Where A. agreed to let B. put a sawmill and houses and fixtures on his land for the purpose of carrying on the business of sawing lumber *as long as B. wished*, it was *held* that B. had a life interest in the land necessary to the business, determinable sooner at B.'s option, and that this interest and the mills, etc., erected according to the privilege were not liable to be sold by a constable by virtue of an execution under a justice's judgment without an order from court. *Held, also*, that ejectment would lie to recover such an interest. *Stancel v. Calvert*, 104.

3. In ejectment, a landlord who is permitted to defend the suit in the place of his tenant is confined to the same defense as his tenant would have been confined to. *Sinclair v. Worthy*, 114.

4. In an action of ejectment against the debtor by a purchaser at sheriff's sale, the defendant needs only a judgment, execution, and sheriff's deed. *Ibid.*, 114.

5. There is no principle of law or practice of the courts by which, after a plaintiff in ejectment has obtained a judgment against the tenant in possession, upon whom a declaration has been served, he can be deprived of the fruits of his judgment by an order to stay the writ of possession on the suggestion that the title was in some other person. *Ibid.*, 114.

EJECTMENT—*Continued.*

6. Where it is established that the deed offered by one of the parties in ejectment claiming under the same person as the other is void, he is not estopped from denying the title of the other party. *McDougald v. McLean*, 120.

ELECTION.

Where one, by will, gave *all his slaves*, equally to be divided among his four children, and afterwards by deed of gift gave two of them, *by name*, to one of his children, there is no rule of law preventing the donee of the two from coming in for an equal share of the residue. *Millsaps v. McLean*, 80.

EQUITY OF REDEMPTION.

1. The interest of a purchaser of land, when the purchase money is not paid, and the title is retained as a security for its payment, is considered and treated as an equity of redemption. *Schoffner v. Fogleman*, 564.

2. The purchaser of an equity of redemption at sheriff's sale has a right to call for the legal estate, upon discharging such part of the mortgage debt as remains unpaid. *Ibid.*, 564.

3. In sales of land under execution, there is a distinction between the cases in which the defendant has an interest subject to execution, and cases where he has not such interest. In the first mentioned cases the purchaser becomes the owner of the defendant's interest. If it be an equity, upon discharging the encumbrances on it, he has a right to call for the legal estate. In the last mentioned cases the purchaser only succeeds to the equity of the debtor, to the extent of holding it as a *security* for the money paid. *Ibid.*, 564.

4. An equity of redemption cannot be sold under an execution for the mortgage debt. *Ibid.*, 564.

5. Where land is sold, and the purchaser gives a bond with a security for the payment of the purchase money, and the title is retained as a further security for its payment, the surety for the original purchase money has the first equity to be indemnified, and his claim is preferred to that of a purchaser of an equity of redemption at sheriff's sale, or of any encumbrancer who comes in by assignment, or otherwise; and the question of notice has no relation to such cases, because neither party has the legal estate. *Ibid.*, 564.

ESTOPPEL.

1. Where it is established that the deed, offered by one of the parties in ejectment, claiming under the same person with the other, is void, he is not estopped from denying the title of the other party. Estoppels must be mutual. *McDougald v. McLean*, 120.

2. One who has made a gift of slaves, void by the act of 1806 (Rev. Code, ch. 50, sec. 12), cannot be estopped to assert his title by any act *in pais*. Nor is he estopped by the record of a partition of the slaves by a suit, some of the parties to which, being infants and his wards, sue by him *as their guardian*. *Branch v. Goddin*, 493.

ESTOPPEL—*Continued.*

3. It *seems* that the defendant would be *estopped* by the recital that, "Upon application to the judge, he had ordered that the prisoners be allowed bail in the sum of $2,000 each, and had authorized the two justices to take the recognizance." *S. v. Edney*, 463.

EVIDENCE.

1. A person whose land has been sold at sheriff's sale is a competent witness in an action of ejectment against the purchaser at such sale, to show that his own title was defective. *McDougald v. McLean*, 120.

2. Any person who had an opportunity of knowing and observing a party whose sanity is impeached may give his opinion of such person's capacity, though he may not be an attesting witness. *Ibid.*, 120.

3. Where a person suspected of murder was arrested as a witness, and brought before a jury of inquest and subjected to a rigid examination, it was *held* that the examination was not competent evidence against him when he was afterwards put upon his trial for the offense. *S. v. Young*, 126.

4. It is erroneous for the court, in the trial of a capital case, to order that an affidavit made by the prisoner for the continuance of his cause shall be read as evidence for the affiant, with leave to the State to offer testimony in contradiction, he, the prisoner, objecting and insisting on a continuance. *S. v. Twiggs*, 142.

5. Where a defendant in a criminal prosecution offered in defense proof of the character which he sustained at the time of the alleged offense, it was *held* to be error to permit evidence to be given by the State of his character at a subsequent time. *S. v. Johnson*, 151.

6. In an action by a passenger on a railroad against the company, to recover damages for the loss of his trunk, the plaintiff is not a competent witness to prove the loss of his trunk, or its contents, though he offer to swear that he has no means of proving those facts, or either of them, except by his own oath. *Smith v. R. R.*, 202.

7. Personal chattels proved to have been taken, found in a house occupied exclusively by the defendant and his wife, is in effect found in the possession of the defendant, and such possession is evidence tending to prove the defendant's guilt. *S. v. Johnson*, 235.

8. Where a witness, who had an interest in a cause, gives or accepts a release in order to extinguish his interest, which release is expressed to be given in consideration of a sum of money named therein, it is competent for the other party to ask him whether there was in fact any consideration paid and received. *Johnson v. Murchison*, 286.

9. An admission by the defendant, indicted under the act of 1863 for "aiding, assisting, harboring, and maintaining," a deserter, that the person so aided, etc., belonged to Captain G.'s company in the army, that he had been at the defendant's house two or three weeks, and defendant believed he was absent from the army without leave, is not, in the absence of all other proof, competent evidence that the person aided, etc., is a soldier in the Confederate Army, or that he is a deserter. *S. v. Lewis*, 300.

EVIDENCE—*Continued.*

10. Parol evidence is admissible to show what matters are submitted to arbitration and what matters are brought to the notice of the arbitrators. *Walker v. Walker*, 255.

11. When a question arises on a jury trial concerning the competency of a witness, and the parties disagree about the facts on which the witness's competency depends, and the judge decides that the witness is competent, but does not state the facts which in his opinion the evidence proves, this Court cannot revise his decision. In such case the prisoner is entitled to a *venire de novo*. *S. v. Norton*, 296.

12. The inference from evidence tending to show that a way over and through a man's land is a public road may be rebutted by evidence of nonuser for more than twenty years. *Burgwyn v. Lockhart*, 264.

13. When it is proved that one has killed intentionally, with a deadly weapon, the burden of showing justification, excuse, or mitigation is on him, and the jury must be satisfied, by the testimony, that the matter offered in mitigation is true. The doctrine of reasonable doubt does not apply. *S. v. Ellick*, 450.

14. The declarations and admissions of a party to a suit, civil or criminal, pertinent to the issue, may be given in evidence against him by the other party. *S. v. Bryson*, 476.

15. The Superior Court has no jurisdiction to decide whether a deposition be regularly taken, except on appeal from the clerk's decision, in pursuance of sec. 68, ch. 31, Rev. Code, or when it is offered to be read in evidence on a trial; therefore, an appeal under ch. 4, sec. 23, Rev. Code, from the decision of a judge on that question does not lie to the Supreme Court, unless the record shows that the judge had acquired jurisdiction in one of these two ways. *Hix v. Fisher*, 474.

EXECUTION.

1. A writ of *fi. fa.* cannot continue by relation a lien on property created by a previous writ, unless it purports on its face to be an *alias*. *McIver v. Ritter*, 605.

2. The purchaser of an equity of redemption at sheriff's sale has a right to call for the legal estate upon discharging such part of the mortgage debt as remains unpaid. *Schoffner v. Fogleman*, 564.

3. In sales of land under execution, there is a distinction between the cases in which the defendant has an interest subject to execution and the cases in which his interest is not so subject. In the first mentioned cases, the purchaser becomes the owner of the defendant's interest, and if it be an equity, upon discharging the encumbrances on it, he has a right to call for the legal estate. In the last mentioned cases, the purchaser only succeeds to the equity of the debtor to the extent of holding it as a *security* for the money paid. *Ibid.*, 564.

4. An equity of redemption cannot be sold under an execution for the mortgage debt. *Ibid.*, 564.

5. A judgment that the defendant recover his costs from the lessor of the plaintiff, in an action of ejectment, where the plaintiff failed in the suit, and an execution of *fieri facias* issued thereon, were held to be proper. *Blount v. Wright*, 89.

EXECUTION—*Continued.*

6. If an article of property laid off to a housekeeper by freeholders be exchanged for another article, the article received in exchange is not exempt from execution. It *seems* that the debtor might have procured the article received in exchange to be laid off to him by a second allotment, and then it would have been exempt. *Lloyd v. Durham*, 282.

7. Where A. agreed to let B. put a sawmill and houses and fixtures on his land for the purpose of carrying on the business of sawing lumber *as long as B. wished*, it was *held* that B. had a life interest in the land necessary to the business, determinable sooner at B.'s option, and that this interest and the mills, etc., erected according to the privilege, were not liable to be sold by a constable by virtue of an execution under a justice's judgment without an order from court. *Held, also*, that ejectment would lie to recover such an interest. *Stancel v. Calvert*, 104.

EXECUTION, CAPITAL.

Upon the conviction of the prisoner in a capital case, the sentence of the court must be carried into execution by the sheriff of the county where he was tried and convicted, and it is erroneous for the court to order execution to be done in the county whence the cause was removed, or by the sheriff of that county. *S. v. Twiggs*, 142.

EXECUTORS AND ADMINISTRATORS.

1. A widow cannot be appointed an administratrix upon her husband's estate while she is under 21 years of age; but the court may appoint an administrator during her minority, and may, on her arriving at full age, grant her the administration, or it may grant the office to her appointee. *Wallis v. Wallis*, 78.

2. On an appeal to the Superior Court from a grant of administration by the court it is not proper for the former court, on the reversal of the order below, to make an appointment itself, but it should order a *procedendo* to the county court. *Ibid.*, 78.

3. The poverty of an executor is not of itself a reason for a court of equity restraining him from administering the estate. *Wilkins v. Harris*, 592.

4. There must be some maladministration on his part, or some danger of loss from the misconduct or negligence of the executor, for which he will not be able to answer by reason of his insolvency. *Ibid.*, 592.

5. The personal representative has no right to ask the advice and direction of the court in the settlement of the estate of the deceased, except as to matters in which he is interested *as* executor or administrator. *Horah v. Horah*, 650.

6. No person can take a distributive share of an intestate's personal estate with his next of kin by force of the act of 1862, ch. 49, but one who by representing an ancestor can put himself in the same degree of kindred to the intestate as his next of kin. *Caldwell v. Cowan*, 639.

7. An administrator has a right to appeal from an order of the county court, affirming the year's allowance made to the widow. *Saunders v. Russell*, 97.

EXECUTORS AND ADMINISTRATORS—*Continued.*

8. A. dies intestate, seized of land in fee simple in this State, which descends to her heir at law resident in another State. His creditors here sue out attachments which are levied on the land, and final judgments are obtained therein and writs of *venditioni exponas* issued. The land is sold by B., the administrator of A., under an order of the county court, for the payment of the debts of the intestate. After payment of them, the administrator is bound in equity to pay the residue to the creditors who attached the land, notwithstanding that the administrator has paid it by order of the nonresident debtor to another *bona fide* creditor. *Sloan v. Mendenhall*, 553.

EXEMPTION.

1. If an article of property, laid off to a housekeeper by freeholders, be exchanged for another article, the article received in exchange is not exempt from execution. *Lloyd v. Durham*, 282.

2. It *seems* that the debtor might have procured the article received in exchange to be laid off to him in a second allotment, and then it would have been exempt. *Ibid.*, 282.

FORCIBLE ENTRY.

An indictment at common law for a forcible entry into "the house of John Bell, Mary Bell being then and there present, and forbidding the same," is fatally defective for want of an averment that it is the dwelling-house of J. B., or that M. B. is the wife, daughter, or other member of the family of J. B. *S. v. Morgan*, 243.

FORCIBLE TRESPASS.

If three men break open the prosecutor's crib and take and carry away his corn therefrom, his son being present and forbidding them, they are guilty of an indictable trespass, and the taking may be averred to be from the presence of the prosecutor. *S. v. Drake*, 236.

FRAUD.

1. A deed absolute on its face, which is intended by the parties to operate as a mortgage, is void in law as to creditors. *Johnson v. Murchison*, 286.

2. If any part of the consideration of a deed be feigned or fraudulent as to creditors, the whole deed is void as to them. *Ibid.*, 286.

3. Where A. and B. were partners in trade in 1851 and 1852, and upon an account taken in 1857, it was found that a balance was due to B.: it was *held*, that a conveyance of his property by A. to C. in 1855, without a valuable consideration, was void as to B., because he was a creditor from 1852. *Ibid.*, 286.

4. A deed made with the intent to convey property in discharge of a supposed debt, which in law is not a debt, is void against creditors, although the alienor thought he owed the debt, and made the conveyance in discharge of his supposed legal obligation. *Ibid.*, 286.

5. A conveyance of property absolute on its face, and declared to have been made in payment of a debt, is a mortgage, if the supposed debt be merely an obligation on the part of the vendor to indemnify the vendee against an event which has not happened, and which may never happen. *Ibid.*, 286.

FRAUD—*Continued.*

6. The State courts have no jurisdiction to restrain persons from acting under the orders or judgments of the Confederate courts, unless they have been obtained by fraud. Whether they have jurisdiction then, this Court declines to express any opinion. They have no jurisdiction to review the proceedings of the Confederate courts. *McLane v. Manning*, 608.

7. The court cannot give relief on the ground of frauds, unless it be positively and distinctly alleged. *Ibid.*, 608.

FREE NEGROES.

1. If a free negro sells his services for a valuable consideration, by deed, for ninety-nine years, he does not thereby cease to be a free man. *Casey v. Robards*, 434.

2. Free negroes are compellable to render the services required of them by the act of Congress of 17 February, 1864. *Ibid.*, 434.

GRANT.

Where A. owned a tract of land in the form of a parallelogram, of which he had an actual possession on one end, and severed the two ends by selling a piece from the middle, and at the end of twenty-two years he conveyed the southern end to B., who continued the possession until the possession of the whole extended beyond thirty years, and then conveyed the northern end by a separate deed, but had no actual occupation of that end, it was *held* that holding it thus for more than thirty years was not sufficient to authorize the presumption of a grant to this northern end. *Newsom v. Kinnamon*, 99.

GUARANTY.

A justice of the peace has no jurisdiction of a guaranty. *Johnson v. Olive*, 213.

HABEAS CORPUS.

1. The courts and judges of the States have concurrent jurisdiction with the courts and judges of the Confederate States in the issuing of writs of *habeas corpus* and in the inquiring into the causes of the detention, even where such detention is by an officer or agent of the Confederate States. *In re Bryan*, 1.

2. The courts of this State, as well as the individual judges, have jurisdiction to issue writs of *habeas corpus*, and to have the return made to them in term-time, and, as a court, to consider and determine the causes of detention. *Ibid.*, 1.

3. Where the object of a writ of *habeas corpus* is to inquire whether there is probable cause for the commitment of the person charged with the crime, the decision on it is not the subject of review by writ of error or *certiorari*. *Walton v. Gatlin*, 310.

4. Where the question in a writ of *habeas corpus* is concerning the power of the committing magistrate or the court, or the legality of the commitment, the weight of authority is in favor of the doctrine that the decision is the subject of review. *Ibid.*, 310.

HABEAS CORPUS—*Continued.*

5. The decision on a writ of *habeas corpus*, to free a person from restraint for any other cause than the commission of a criminal offense, is a *judgment*, and is the subject of review by writ of error or *certiorari*. *Ibid.*, 310.

6. The Supreme Court has the power to review the action of the Superior Courts, and of the judges in vacation, upon questions of law in all cases arising under the *Habeas Corpus Act*, Rev. Code, ch. 55, sec. 10.

7. The applicant was held, by *Judge Pearson* in vacation, to be entitled to have the writ of *habeas corpus* issued in his favor, notwithstanding the suspension of the privilege by the act of Congress. *In re Roseman*, 368.

8. A soldier actually and rightfully in the army can have no relief by the writ of *habeas corpus* against any alleged abuse of military authority. *Cox v. Gee*, 516.

9. If he be *wrongfully* held as a soldier, yet he is not entitled to the writ of *habeas corpus* while he is undergoing punishment or awaiting trial for a military offense. *Ibid.*, 516.

10. Held, by *Pearson, C. J.*, in vacation, that the act of the Confederate Congress suspends the writ of *habeas corpus ad subjiciendum* only, and then when the party is charged with the commission or with the intent to commit some criminal offense. *In re Cain*, 525.

11. Held, by *Battle, J.*, in vacation, that the act of the Confederate Congress suspending the benefit of the writ of *habeas corpus* applied to the case of a person who was claimed as a conscript under the act of 17 February, 1864, and that the judge, when the cause was shown in the petition, was prohibited from issuing the writ. *In re Long*, 534.

12. Held, by *Manly, J.*, in vacation, that when the return of the officer to the writ of *habeas corpus* disclosed the fact that the petitioner was held as a conscript, under the act of Congress, the judge could not proceed any further with the case, but must remand the petitioner. *In re Rafter*, 537.

13. Held, by *Pearson, C. J.*, in vacation, that when the officer certified to a writ of *habeas corpus*, that he held the petitioner as a conscript under the act of Congress, and for that reason did not return the body of the petitioner, the judge could not proceed to render a judgment of discharge. *In re Spivey*, 540.

14. Presenting a petition to a judge for a writ of *habeas corpus* gives him jurisdiction of the subject, and the parties may waive all errors and dispense with all forms in the proceedings on it. *S. v. Edney*, 463.

15. Where a petition for *habeas corpus* was presented to a judge in order that the petitioner might be admitted to bail, and the judge gave no formal judgment, but informally expressed his opinion in writing on the petition, that the prisoner was entitled to bail, and signed his name *officially* to a sheet of paper, that a writ might issue if the parties desired it, and, by the consent of the solicitor for the State, suggested that bail might be taken without any further proceedings on

HABEAS CORPUS—*Continued.*

the petition, and fixed the amount in which bail should be taken, and named the justice of the peace to take it, and the prisoner was afterwards discharged from prison, on his entering into the recognizance, together with the defendant as his surety, in the sum fixed by the judge, before the justices named by him, and the prisoner and defendant subscribed their names and affixed their seals to the recognizance, this is plenary proof of a waiver of all errors in the proceedings. *Ibid.*, 563.

HIGHWAY.

The inference, from evidence tending to show that a way over and through a man's land is a highway or public road may be rebutted by evidence of *nonuser* for more than twenty years. *Burgwyn v. Lockhart*, 264.

HOME GUARD.

1. A member of the Home Guard cannot, under the act of Assembly of July, 1863, be compelled to assist in arresting deserters or recusant conscripts. *In re Austin*, 544.

2. A citizen of Maryland, being an alien enemy, is not liable to service in the Home Guard under the act of Assembly which requires such service from all foreigners who have been residents of the State for thirty days. *In re Finley*, 191.

3. A bonded exempt is in the service of the Confederate States, by force of a constitutional act of Congress, 17 February, 1864, sec. 10, clause 4, paragraphs, 1, 2, and 3; and, therefore, he is not liable to service in the Home Guard, under State laws. *Wood v. Bradshaw*, 419.

4. A contractor to carry the mail is a civil officer of the Confederate Government, and, therefore, exempted from service in the Home Guard by the act of the General Assembly passed at the session of July, 1863, ch. 10. *Bringle v. Bradshaw*, 514.

See Conscription.

HOMICIDE.

1. Where a defendant, in a State's warrant, charging a misdemeanor, put himself in armed resistance to the officer having such warrant, and the officer, in attempting to take him, slew him without resorting to any unnecessary violence, it was *held* that he was justified in slaying the defendant. *S. v. Garrett*, 144.

2. The principle of "self-defense" does not apply to the case of one who puts himself in the posture of armed defiance to the process of the State. *Ibid.*, 144.

3. A person to whom a State's warrant is specially directed is bound to show it and read it, if required to do so; but where the defendant in such warrant had notice of the process and was fully aware of its contents, and had made up his mind, beforehand, to resist its execution, it was *held* that the officer did not become a trespasser *ab initio* by refusing to produce his warrant when demanded by such defendant. *Ibid.*, 144.

HOMICIDE—*Continued.*

4. Whether, where the manner of a homicide, charged in a bill of indictment, is by cutting the throat of the deceased with a knife, and the proof is that it was done by blows inflicted on the head with a gun, the variance is material, *quære*. *S. v. Murph*, 129.

5. It is no valid objection to the record of an indictment and conviction thereon in a capital case that the record does not set out that the grand jury found the indictment to be a "true bill," nor that the witnesses, upon whose testimony the indictment was found, were sworn before they were sent to the grand jury. *S. v. Harwood*, 226.

6. If A. is about to strike B., who is unwilling to enter into a fight, and shows it by words or actions, and A. presses on and strikes, or attempts to strike, and thereupon B. kills A. with a deadly weapon, it is *manslaughter*. *S. v. Ellick*, 450.

7. If on a sudden quarrel the parties begin a fight by consent, at the instant, with deadly weapons, and, after blows pass, one uses a deadly weapon and kills, it is *manslaughter*. *Ibid.*, 450.

8. If on a sudden quarrel the parties fight by consent, at the instant, with deadly weapons, and one is killed, it is but *manslaughter;* provided the parties fight on equal terms and no undue advantage is taken. *Ibid.*, 450.

9. Where words passed between the prisoner and the deceased, who were sitting on the doorsill, and the prisoner got up; the deceased then got up and reached his hand inside the door and got a stick, which was a deadly weapon, and, as he was turning around with the stick, the prisoner stabbed him with a bowie-knife: *Held*, to be *murder*. *Ibid.*, 450.

10. If on a trial of an indictment for murder the judge instructs the jury that if they believe the witnesses on either side, the prisoner is guilty, it is equivalent to a charge that the prisoner is guilty upon his own evidence alone, taken in the most favorable view for him; and there is no error if his evidence did not, in such view, tend to prove his innocence or to mitigate his offense to a lower grade. *Ibid.*, 450.

11. When it is proved that one has killed intentionally, with a deadly weapon, the burden of showing justification, excuse, or mitigation is on him, and the jury must be satisfied by the testimony that the matter offered in mitigation is true. The doctrine of reasonable doubt does not apply. *Ibid.*, 450.

12. If an indictment for murder charge that the prisoner killed the deceased, and that others were present aiding and abetting, and it is proved that the deceased was killed by some one with whom the prisoner was acting in concert, and that he was present, aiding and assisting, the jury should be instructed to find him guilty of *murder*. *S. v. Cockman*, 484.

13. If several armed men go to a dwelling-house in the night-time, for the purpose of seizing the body of the owner, without lawful authority, and one of them be killed by the owner to prevent the execution of their purpose, such killing is not *murder*. *S. v. Medlin*, 488.

HUSBAND AND WIFE.

1. A husband cannot be convicted of a battery on his wife unless he inflict a permanent injury, or uses such excessive violence or cruelty as indicates malignity or vindictiveness; and it makes no difference that the husband and wife are living separate by agreement. *S. v. Black*, 262.

2. A conveyance of land to a man and his wife and their heirs vests the entirety in each of them, and upon the death of one of them, the survivors take the whole in severalty. *Woodford v. Higley*, 244.

3. Gifts made by a husband to his wife during coverture will be supported in equity against the representatives of the deceased husband. *Smith v. Smith*, 481.

4. Contracts by a husband with his wife for a valuable consideration will be enforced in equity against his representatives. *Ibid.*, 581.

INDICTMENT.

1. Whether, where the manner of a homicide, charged in a bill of indictment, is by cutting the throat of the deceased with a knife, and the proof is that it was done by blows inflicted on the head with a gun, the variance is material, *quære*. *S. v. Murph*, 129.

2. It is no valid objection to the record of an indictment and conviction thereon in a capital case that the record does not set out that the grand jury found the indictment a "true bill," nor that the witnesses, upon whose testimony the bill was found, were sworn before they were sent to the grand jury. *S. v. Harwood*, 226.

3. An indictment, upon sec. 29, ch. 107, Revised Code, is sufficient, if it avers that the defendant did "permit the slave Peggy to keep house to herself as a free person," and in the second count did "connive at the said negro slave keeping house to herself as a free person." *S. v. Duckworth*, 240.

4. An indictment at common law for a forcible entry into the house of J. B., Mary B. being then and there present, forbidding the same, is fatally defective for want of an averment that it is the dwelling-house of J. B., or that Mary B. is the wife, or daughter, or other member of the family of J. B. *S. v. Morgan*, 243.

5. Whether an indictment under the act of 1863, for "aiding, assisting, harboring, and maintaining" a deserter, must not aver that the aided, etc., is a soldier in the army of the Confederate States, as well as that he is a deserter, *quære*. *S. v. Lewis*, 300.

6. Buying of and receiving from a slave corn or other forbidden article on the slave's own account, the owner of the slave being present and knowing what is done, but giving no *written* permission, and the slave not knowing of the master's presence, is indictable under the Revised Code, ch. 34, sec. 85. *S. v. Honeycutt*, 446.

7. If a slave, living in a house to himself, keeps a boarding-house for his own livelihood, and the master, knowing it, exercises no control over him or his business, this is an indictable offense under the Revised Code, ch. 107, sec. 29. *S. v. Brown*, 448.

INDICTMENT—*Continued.*

8. It is not a ground for the arrest of a judgment that the two offenses of permitting a slave to go at large as a free person and of permitting him to keep house as a free person are joined in the same count of an indictment. *Ibid.*, 448.

INJUNCTION.

1. Where the bill alleged that the plaintiff had conveyed his land and his horses, mules, hogs, etc., wheat, hay, corn, etc., to the defendant by a deed absolute on its face, but which was intended to be only a security for the payment of money, and it was put in the form of an absolute conveyance by the fraud and oppression of the defendant, and that defendant had advertised a public sale of all the property, it was *held* that the plaintiff was entitled to an injunction; and although the answer positively denied any fraud or imposition, or that there was any agreement or understanding that the plaintiff should have any right of redemption, yet as the answer contained admissions which, taken in connection with the allegations of the bill, furnished a probable ground of belief that the latter were substantially true, the injunction should be continued until the hearing. *Peeler v. Barringer*, 556.

2. The State courts have no jurisdiction to restrain, by injunction, persons from acting under the orders or judgments of the Confederate courts, unless, *perhaps*, where they have been obtained by fraud. The State courts have no jurisdiction to review the proceedings of the Confederate courts. *McLane v. Manning*, 608.

3. If the State courts have power to give relief against an order or judgment of a Confederate court obtained by fraud (which is not decided), they would not do so unless the fraud were positively and distinctly averred. *Ibid.*, 608.

4. A person acting as an officer of the law under a judicial order or judgment ought not to be made a party defendant to a bill for an injunction to restrain the execution of such order or judgment. *Ibid.*, 608.

5. A court of equity will entertain a bill against a municipal corporation for the purpose of trying the legality of a tax imposed by the corporation. *Worth v. Commissioners*, 617.

6. Whether courts of equity will interfere by injunction to restrain collection of State and county tax, *quære*. It seems they cannot. *Ibid.*, 617.

INSOLVENT DEBTOR.

1. If an article of property laid off for an insolvent debtor (who is a housekeeper) by freeholders be exchanged for another article, such article received in exchange is not exempt from taxation. *Lloyd v. Durham*, 282.

2. It *seems* that the insolvent debtor might have procured the article received in exchange to be laid off to him by a second allotment, and then it would have been exempt from execution. *Ibid.*, 282.

JOINT TENANCY.

1. If property be given to two as joint tenants, and one die in the lifetime of the testator, by the operation of our act abolishing survivorship in joint tenancy his share falls into the residue. *Coley v. Ballance*, 634.

2. Where land is purchased in fee by a partnership with partnership funds and for partnership purposes, and one partner dies, his share of the land descends to his heir, in equity, as at law. *Summey v. Patton*, 601.

3. And it *seems* that upon a dissolution of the partnership by effluxion of time or otherwise, all the partners then living, the land will be regarded as real estate, as between them. *Ibid.*

4. A conveyance of land to a man and his wife and their heirs vests the entirety in each of them, and upon the death of one of them the survivor takes the whole in severalty. *Woodford v. Higly*, 234.

JUDGE'S CHARGE.

1. The judge is not bound to give special instructions to the jury, at the request of the counsel, on a hypothetical case. *S. v. Murph*, 129.

2. Where there is a conflict of testimony, which leaves a case in doubt before the jury, and the judge, in his instructions, uses language which may be subject to misapprehension, and is calculated to mislead the jury, the Supreme Court will order a *venire de novo*. *S. v. Bailey*, 137.

3. It cannot be assigned for error by a party that the judge did not charge the jury upon a point which the party did not make at the trial. *Higdon v. Chastaine*, 210.

4. Where evidence is direct, leaving nothing to inference, and, if believed, is the same thing as the fact sought to be proved, the judge is at liberty to instruct the jury that if they believe the witness they may find for the plaintiff or for the defendant. But this is not allowed where the evidence is circumstantial, or where the evidence offered on the other side tends to explain it, or to rebut the inferences sought to be drawn from it, or to contradict the witness. *Gaither v. Ferebee*, 303.

5. Any remark made by a judge, on the trial of an issue by the jury, from which the jury may infer what his opinion is as to the sufficiency or insufficiency of the evidence, or any part of it pertinent to the issue, is error; and the error is not corrected by his telling the jury that it is their exclusive province to determine on the sufficiency or insufficiency of the evidence, and that they are not bound by his opinion in regard to it. *S. v. Dick*, 440.

6. It is error for the judge to leave to the jury the decision of a fact on which the admissibility of evidence depends. But if the party excepting cannot possibly be injured by it, it is not a ground for a *venire de novo*. *Ibid.*, 440.

7. If on the trial of an indictment witnesses are examined by the State, and other witnesses are examined by the defendant to maintain his defense, and the judge instructs the jury that if they believe the

JUDGE'S CHARGE—*Continued.*

witnesses on either side, the defendant is guilty, the Supreme Court considers the charge only in its application to the evidence offered by the defendant, and assumes everything to be proved on his part which a jury would be at liberty to infer from that evidence. *S. v. Ellick*, 450.

8. The judge, in his charge, is required to put the case to the jury in such a way as to make it appear by the record what facts the jury find, and what is his opinion as to the law. *S. v. Summey*, 495.

JUDGMENT.

1. A judgment that the defendant recover his costs from the lessor of the plaintiff, in an action of ejectment, when the plaintiff failed in the suit, and a writ of *fi. fa.* issued thereon, were held to be proper. *Blount v. Wright*, 89.

2. The decision of a writ of *habeas corpus* to free a person from restraint for any other cause than the commission of a criminal offense is a *judgment*, and the subject of review by writ of error or *certiorari*. *Walton v. Gatlin*, 310.

JURISDICTION.

1. A justice of the peace has no jurisdiction of a guaranty. *Johnson v. Oliver*, 213.

2. The courts and judges of the States have concurrent jurisdiction with the courts and judges of the Confederate States in the issuing of writs of *habeas corpus*, and in the inquiring into the causes of detention, even where such detention is by an officer or agent of the Confederate States. *In re J. C. Bryan*, 1.

3. The courts of this State, as well as the individual judges, have jurisdiction to issue writs of *habeas corpus* and to have the return made to them in term-time, and, as a court, to consider and determine of the causes of detention. *Ibid.*

JURISDICTION, CONFLICT OF.

The State courts have no jurisdiction to restrain persons from acting under the orders or judgments of the Confederate courts, unless they have been obtained by fraud. Whether they have jurisdiction then, this Court declines to express any opinion. They have no jurisdiction to review the proceedings of the Confederate courts. *McLane v. Manning*, 608.

JURORS.

1. It is no ground for a challenge to the array, in a capital case, that it does not appear from an order for a special *venire facias* that it was made in the case of the prisoner. It is sufficient if it appear that it was made at the term at which the trial was had. *S. v. Murph*, 129.

2. A challenge to the array of jurors is generally founded on a charge of partiality, or some default in the sheriff or other officer summoning them. *Ibid.*, 129.

JURORS—*Continued.*

3. Where an action *on the case* brought by A. against B. for fraudulently removing a debtor was tried and a verdict found for the defendant, and afterwards the same jury was tendered in a cause of C. against B. for the same act of removing, and were challenged by the plaintiff, it was *held* that this was a principal cause of challenge to the polls and not to the array, and ought to have been allowed, because the jurors were necessarily under a bias from having decided the previous cause. *Baker v. Harris*, 271.

4. A principal cause of challenge involves matter of law, and the decision upon it in the court below may be reviewed upon appeal in the Supreme Court. *Ibid.*, 271.

5. Jurors ought not to be asked, either on oath or otherwise, whether their minds are in such a state that they can try a case fairly and impartially. Their answer can have no influence on the question of their competency, and it is improper practice to ask them. *Ibid.*, 271.

6. If a challenge by the prisoner for good cause be disallowed, and the juror be challenged peremptorily by him, and the panel is completed before the prisoner has challenged peremptorily as many as twenty-three jurors, this is no cause for a *venire do novo*. *S. v. Cockman*, 484.

7. A juror, challenged by the prisoner because he had formed and expressed an opinion that the prisoner was guilty, says on his examination by the court that he has formed and expressed his opinion from rumor only, but that he thinks he can give an impartial verdict on the trial, and is judged to be indifferent by the court, and is tendered to the prisoner; this is no error of which the prisoner can complain. *Ibid.*, 484.

JUSTICE OF THE PEACE. See Jurisdiction.

JUSTICE'S EXECUTION.

Where A. agreed to let B. put a sawmill, houses and fixtures, on his land for the purpose of carrying on the business of sawing lumber *as long as B. wished*, it was *held*, that B. had a life interest in the land necessary to the business, determinable sooner at B.'s option, and that this interest and the mills, etc., erected according to the privilege, were not liable to be sold by a constable by virtue of an execution under a justice's judgment without an order from court. *Stancel v. Calvert*, 104.

LARCENY.

Property proved to have been stolen, found six weeks after the theft, in a house occupied exclusively by the defendant and his wife, is found in the possession of the defendant, and such possession is evidence tending to prove the defendant's guilt. *S. v. Johnson*, 235.

LEGACY. See Bequest.

MANSLAUGHTER. See Homicide.

MARRIAGE SETTLEMENT.

1. Courts of equity will not reform a marriage settlement by which property is conveyed to the separate use of the wife, when the bill does

MARRIAGE SETTLEMENT—*Continued.*

not allege any fraud, imposition, error, or mistake in respect of the contents of the deed or its execution, and there is no allegation that any provision of the deed has been found hurtful to the fund, prejudicial to the interests of the parties, or of marked inconvenience in execution. *Crossland v. Shober*, 562.

2. In a marriage settlement, the word "children" in the grant of a remainder, after the death of A., to "*her children* living at her death," will embrace *grandchildren*, if other parts of the conveyance show that it was the intention of the parties to provide for grandchildren. *Scott v. Moore*, 642.

MORTGAGE.

1. A deed absolute on its face, which is intended to operate as a mortgage, is void in law against creditors. *Johnson v. Murchison*, 286.
2. If any part of the consideration of a deed be feigned or fraudulent as to creditors, the whole deed is void as to them. *Ibid*, 286.
3. A conveyance of property absolute on its face, and declared to be made in payment of a debt, is a mortgage, if the supposed debt be merely an obligation on the part of the vendor to indemnify the vendee against an event which has not happened, and may never happen. *Ibid.*, 286.
4. In taking an account under a decree that property, in possession of the mortgagee, should be retained by him in satisfaction of the mortgage debt at a valuation to be fixed by the clerk, the valuation must be made according to what the property would bring in specie. *Bowers v. Strudwick*, 612.

MURDER. See Homicide.

NEGLIGENCE.

1. Where it had been made to appear by the plaintiff's testimony that his horse had been injured on a railroad by the running of a train against it, and it was left doubtful from defendant's testimony whether the brakes had been applied to the wheels of the train after the animal was discovered to be on the track, it was *held*, that the *prima facie* case of negligence made by the act of 1856, ch. 7, was not repelled. *Clark v. R. R.*, 109.
2. An officer who has received the note of a *feme covert* within a magistrate's jurisdiction for collection is not guilty of negligence so as to subject him on his official bond in failing to take out a warrant on the claim. *Graham v. Buchanan*, 93.
3. Where the deputy of a sheriff received the bond of a married woman within a magistrate's jurisdiction for collection, and failed to collect the same during the sheriff's official term, but afterwards, when acting as the deputy of his successor, collected it and failed to pay over the money, it was *held* that there was no breach of the former sheriff's official bond. *Ibid.*, 93.

NEW TRIAL.

1. When on a trial of a criminal case a question arises as to the competency of a witness offered by the State, and the parties disagree

NEW TRIAL—*Continued.*

about the facts on which the witness's competency depends, and the judge decides that the witness is competent, but does not state the facts which, in his opinion, the preliminary evidence proves, the Supreme Court has no means of reversing his decision, and, in such case the defendant is entitled to a new trial. *S. v. Norton*, 296.

2. Where there is a conflict of testimony which leaves a case in doubt before a jury, and the judge, in his instructions, uses language which may be subject to misapprehension, and is calculated to mislead. this Court will order a *venire de novo*. *S. v. Bailey*, 137.

3. If a challenge by the prisoner for good cause be disallowed, and the juror be challenged peremptorily by the prisoner and the panel is completed, the prisoner having challenged peremptorily a smaller number than twenty-three, this is no cause for a *venire de novo*. *S. v. Cockman*, 484.

4. A juror, challenged by the prisoner because he had formed and expressed an opinion that the prisoner was guilty, says on his examination by the court, that he has formed and expressed an opinion to that effect, from rumor, but that he thinks he can give an impartial verdict on the trial, is adjudged by the court to be indifferent between the parties, and is tendered to the prisoner; this is not error of which the prisoner can complain. *S. v. Cockman*, 484.

See Judge's Charge.

NONSUIT.

1. Where a rule was obtained against a plaintiff in the county court to give oyer of his cause of action by a given day, at the next term, it was *held* to be regular for the plaintiff to submit to a nonsuit before the day assigned at the next term, and take an appeal to the Supreme Court. *Johnson v. Murchison*, 83.

2. A nonsuit may be entered before defendant's appearance or before pleading or at any day of continuance in the cause. *Ibid.*, 83.

NUNCUPATIVE WILL.

Where a person in his last sickness desired the physician to write his will, and the physician declined to do it, but told him that A. and B. were on the piazza, and that he might make his will by oral declarations in their presence; and A. and B. were called into the sick man's presence by his direction, and addressing A. by name, he stated to him, in the presence of B. and the physician, how he wished his property to be divided, and named A. and another as his executors: that is sufficient *rogatio testium* to make a valid nuncupative will. *Haden v. Bradshaw*, 259.

OFFICERS.

1. If an officer of the State accept another office from the State, or from another government, the duties of which are incompatible with those of the first, such former office will thereby be vacated. *In re Martin*, 153.

2. The office of brigadier general, under the Confederate States, was held to be incompatible with that of adjutant general under the State of North Carolina. *Ibid.*, 153.

PARTITION.

1. Where on a petition for the partition of slaves the county court ordered that it should be made in certain proportions, and appointed commissioners to make it accordingly, and on an appeal to the Superior Court the order was reversed, and a division directed in different proportions, it was *held* that the Superior Court was not in possession of the whole case by the appeal, and that writ of *procedendo* to the county court was proper. *Millsaps v. McLean*, 80.

2. A statement in a bill for the partition of lands and an account of the rents and profits received by the defendant, that the defendant "has received the rents and profits and appropriated them to his own use and benefit," does not imply that the defendant is possessed adversely to the plaintiff, and is, therefore, no cause of demurrer. *McCracken v. Love*, 641.

3. One who has made a gift of slaves, void by the act of 1806 (Rev. Code, ch. 50, sec. 12), cannot be estopped to assert his title by any act *in pais*. Nor is he estopped by the record of a partition of the slaves in a suit, some of the parties to which, being infants and his wards, sue by him as their guardian. *Branch v. Goddin*, 493.

PARTNERSHIP.

1. Where a partnership has had continuous dealings with a distant correspondent for some time, actual notice of its dissolution must be given to such correspondent to prevent a liability of all the members of the firm for subsequent dealings, carried on by one of the partners in the name of the firm, though without the knowledge or consent of the late partners. *Scheiffelin v. Stephens*, 106.

2. Publication of such notice in a local newspaper in this State was *held* not to be actual notice, nor was it evidence from which actual notice could be inferred. *Ibid.*, 106.

3. Where land is purchased in fee, by partners, with partnership funds, and used for partnership purposes, and one of the partners dies, his share of the land descends to his heir, as well in equity as in law. *Summey v. Patton*, 601.

4. And it *seems* that upon a dissolution of the partnership by effluxion of time, or otherwise, all the partners being alive, the land will be regarded as real estate, as between them. *Ibid.*, 601.

5. Where real estate of an inheritance is purchased by partnership, for partnership purposes, and is so used, on the death of one of the partners, his widow is entitled to dower. *Patton v. Patton*, 572.

PAYMENT OF MONEY INTO COURT.

1. Where a defendant in a justice's warrant, after a trial and judgment against him, but before an appeal, paid a part of the claim to the justice, who held it till the trial above took place, and then paid it to the officer of the appellate court, it was *held* that under the pleas of "tender and refusal" and "always ready" the measure was unavailing. *Cope v. Bryson*, 112.

2. The proper way for a defendant to avail himself of a payment into court is to have a rule of court to permit him to do so. *Ibid.*, 112.

PAYMENT OF MONEY INTO COURT—*Continued.*

3. Whether a justice of the peace can make a rule to pay money into his hands which will avail an appellate court, *quære*. *Ibid.*, 112.

PLEADING.

1. The treasurer of the trustees of Davidson College is not a corporation sole; and therefore, if a bond be made payable to him and his successors, as such, no suit can be brought on it in the name of a successor, but should be brought in his name, if living, or in that of his personal representative, if dead. *McDowell v. Hemphill*, 96.

2. If the general issue be pleaded together with special pleas, and the jury find all the issues in favor of the defendant, the Supreme Court cannot reverse the judgment for error in the charge of the judge respecting the matter of the special pleas. *Higdon v. Chastaine*, 210.

POSSESSION.

1. Property proved to have been stolen, found in a house occupied exclusively by the defendant and his wife, is found in the possession of the defendant, and such possession is evidence tending to prove the defendant's guilt. *S. v. Johnson*, 235.

2. Where a tract of land had marked trees all around it demarking 300 acres, and a person held a small isolated parcel within these bounds for five years, but there was no evidence to connect him with the marked trees or with the grant under which the marks were made, it was *held* that he had not *prima facie* evidence of title to the land, according to these bounds, under the act of 1850. *Kron v. Cagle*, 118.

3. Where A. owned a tract of land in the form of a parallelogram, of which he had an actual possession on one end, and severed the two ends by selling a piece from the middle, and at the end of twenty-two years he conveyed the southern end to B., who continued the possession until the possession of the whole extended beyond thirty years, and then conveyed the northern end by a separate deed, but had no actual occupation of that end, it was *held*, that holding it thus for more than thirty years was not sufficient to authorize the presumption of a grant to this northern end. *Newsom v. Kinnamon*, 99.

POWER.

1. A devise to A. for life, remainder to B., her son, in fee, with a power to sell all or so much of the property as, in her judgment, may be necessary, vests in A. an estate for her life only, with a power of sale appurtenant to her life estate. *Troy v. Troy*, 624.

2. In such a devise an expression in a subsequent part of the will of a doubt whether the power of sale would not make A. the absolute owner of the estate, and a direction that in case such should be the construction in law, that C. should take the legal estate in the property in trust, etc., does not convey to C. any interest in the property. *Ibid.*

3. Where in such a devise as the above the expense of the education of the son is made a charge on all the property, A. will hold the proceeds of such sales as she may make under the power, in trust to pay debts, and then for her own support and for the support and education of her son B. *Ibid.*

PRACTICE.

1. Where a rule was obtained against a plaintiff, in the county court, to give *oyer* of his cause of action by a certain day, at the next term, it was *held* to be regular for the plaintiff to submit to a judgment of nonsuit before the day assigned at the next term, and to take an appeal to the Superior Court. *Johnson v. Murchison*, 83.

2. A nonsuit may be entered before the defendant's appearance, or before pleading, or any day of continuance in the cause. *Ibid.*, 83.

3. Where a defendant in a justice's warrant, after a trial and judgment against him, but before an appeal, paid a part of the claim to the justice, who held it until the trial in the appellate court took place, and there paid it to the clerk of that court, who produced it on trial, it was *held*, that under the pleas of "tender and refusal" and "always ready" the payment was unavailing. *Cope v. Bryson*, 112.

4. The proper way for a defendant to avail himself of a payment of money into court is to obtain a rule of court to permit him to do so. *Ibid.*, 112.

5. Whether a justice can make a rule to pay money into his hands which will be of any avail in the appellate court, *quære*. *Ibid.*, 112.

6. Where an appeal stood on the docket of the Superior Court for three terms, and at the fourth the appellee moved to dismiss it for some irregularity in the judgment of the county court, it was *held*, that all such objections were considered as waived by the delay and acquiescence. *Johnson v. Murchison*, 83.

7. Every court must enforce its own rules; and, therefore, it is not a ground for dismissing an appeal from the Superior Court that the county court failed to enforce a rule made by itself incidentally in the progress of a cause. *Ibid.*, 83.

8. An administrator has a right to appeal from an order of the county court, affirming the year's allowance made to the widow. *Saunders v. Russell*, 97.

9. If a sheriff fail to take bail, the plaintiff need not file exceptions, nor give notice to fix him as bail. *Adams v. Jones*, 198.

10. A clerk can only be proceeded against on motion for a summary judgment for money that has remained in his hands for three years, where he has *admitted money to be due*, in the manner prescribed by section 1, chapter 73, Revised Code. *Summey v. Johnston*, 98.

11. A judgment that the defendant recover his costs from the lessor of the plaintiff in an action of ejectment, where the plaintiff failed in the suit, and an execution of *fieri facias* issued thereon, were held to be proper. *Blount v. Wright*, 89.

12. In ejectment, a landlord who is permitted to defend the suit in the place of his tenant is confined to the same defense as his tenant would have been confined to. *Sinclair v. Worthy*, 114.

13. In an action of ejectment against the debtor by a purchaser at sheriff's sale, the defendant needs only a judgment, execution, and sheriff's deed. *Ibid.*, 114.

PRACTICE—*Continued.*

14. There is no principle of law or practice of the courts by which, after a plaintiff, in ejectment, has obtained a judgment against the tenant in possession, upon whom a declaration has been served, he can be deprived of the fruits of his judgment by an order to stay the writ of possession on the suggestion that the title was in some other person. *Ibid.*, 114.

15. A writ of *fi. fa.* cannot continue by relation a lien on property created by a previous writ, unless it purports on its face to be an *alias*. *McIver v. Ritter*, 605.

16. It is erroneous for the court, in the trial of a capital case, to order that an affidavit made by the prisoner for the continuance of his cause shall be read as evidence for the affiant, with leave to the State to offer testimony in contradiction, he, the prisoner, objecting and insisting on a continuance. *S. v. Twiggs*, 142.

17. On an appeal to the Superior Court, from a grant of administration by the county court, it is not proper for the former court, on the reversal of the order below, to make an appointment itself, but it should order a *procedendo* to the county court. *Ibid.*, 78.

18. It is no valid objection to the record of an indictment and conviction thereon in a capital case, that the record does not set out that the grand jury found the indictment to be a "true bill," nor that the witnesses, upon whose testimony the indictment was found, were sworn before they were sent to the grand jury. *S. v. Harwood*, 226.

19. The judge is not bound to give special instructions to the jury, at the request of the counsel, on a hypothetical case. *S. v. Murph*, 129.

20. Where there is a conflict of testimony, which leaves a case in doubt before the jury, and the judge, in his instructions, uses language which may be subject to misapprehension, and is calculated to mislead the jury, the Supreme Court will order a *venire de novo*. *S. v. Bailey*, 137.

21. It cannot be assigned for error by a party that the judge did not charge the jury upon a point which the party did not make at the trial. *Higdon v. Chastaine*, 210.

22. Where evidence is direct, leaving nothing to inference, and if believed, is the same thing as the fact sought to be proved, the judge is at liberty to instruct the jury that if they believe the witness, they may find for the plaintiff or for the defendant. But this is not allowed where the evidence is circumstantial or where the evidence offered on the other side tends to explain it or to rebut the inferences drawn from it, or to contradict the witness. *Gaither v. Ferebee*, 303.

23. It is no ground for a challenge to the array, in a capital case, that it does not appear from an order for a special *venire facias* that it was made in the case of the prisoner. It is sufficient if it appear that it was made at the term at which the trial was had. *S. v. Murph*, 129.

24. A challenge to the array of jurors is generally founded on a charge of partiality, or some default in the sheriff or other officer summoning them. *Ibid.*, 129.

PRACTICE—*Continued.*

25. Where an action *on the case* brought by A. against B. for fraudulently removing a debtor was tried and a verdict found for the defendant, and afterwards the same jury was tendered in a cause of C. against B. for the same act of removing, and were challenged by the plaintiff, it was *held* that this was a principal cause of challenge to the polls and not to the array, and ought to have been allowed, because the jurors were necessarily under a bias from having decided the previous case. *Baker v. Harris*, 271.

26. A principal cause of challenge involves matter of law, and the decision upon it in the court below may be reviewed upon appeal in the Supreme Court. *Ibid.*, 271.

27. Jurors ought not to be asked, either on oath or otherwise, whether their minds are in such a state that they can try a case fairly and impartially. Their answer can have no influence on the question of their competency, and it is an improper practice to ask them. *Ibid.*, 271.

28. When, on the trial of a criminal case, a question arises as to the competency of a witness offered by the State, and the parties disagree about the facts on which the witness's competency depends, and the judge decides that the witness is competent, but does not state the facts which, in his opinion, the preliminary evidence proves, the Supreme Court has no means of reversing his decision, and in such case the defendant is entitled to a new trial. *S. v. Norton*, 296.

29. Where, on a petition for the partition of slaves, the county court ordered that it should be made in certain proportions, and appointed commissioners to make it accordingly, and on an appeal to the Superior Court the order was reversed, and a division directed in different proportions, it was *held* that the Superior Court was not in possession of the whole case by the appeal, and that a writ of *procedendo* to the county court was proper. *Millsaps v. McLean*, 80.

30. Where the bill alleged that the plaintiff had conveyed his land and his horses, mules, hogs, etc., wheat, hay, corn, etc., to the defendant by a deed absolute on its face, but which was intended to be only a security for the payment of money, and it was put in the form of an absolute conveyance by the fraud and oppression of the defendant, and that the defendant had advertised a sale of all the property, it was *held* that the plaintiff was entitled to an injunction; and although the answer positively denied any fraud or imposition, or that there was any agreement or understanding that the plaintiff should have any right of redemption, yet as the answer contained admissions which, taken in connection with the allegations of the bill, furnished a probable ground of belief that the latter were substantially true, the injunction should be continued until the hearing. *Peeler v. Barringer*, 556.

31. If the State courts have power to give relief against an order or judgment of a Confederate court obtained by fraud (which is not decided), they would not do so unless the fraud were positively and distinctly averred. *McLane v. Manning*, 608.

PRACTICE—*Continued.*

32. A person acting as an officer of the law, under a judicial order or judgment, ought not to be made a party defendant to a bill for an injunction to restrain the execution of such order or judgment. *Ibid.*, 608.

PRESUMPTION.

1. Where A. claims a tract of land in the form of a parallelogram, of which he had an actual occupation of one end, and severed the two ends by selling a piece from the middle, and at the close of twenty-two years he conveys the southern end to B., who continued the possession for more than eight years longer, and then A. conveys the northern end by a separate deed, but had no actual occupation of that end, it was *held* that there was no such possession by A. of the northern end for thirty years as to authorize the presumption of a grant of that end. *Newsome v. Kinnamon*, 99.

2. The inference from evidence, tending to show that a way over and through a man's land is a public road, may be rebutted by evidence of nonuser for more than twenty years. *Burgwyn v. Lockhart*, 264.

RAILROAD.

1. Where it had been made to appear by the plaintiff's testimony that his horse had been injured on the railroad by the running of a train against it, and it was left doubtful from defendant's testimony whether the brakes had been applied to the wheels of the train after the animal was discovered to be on the track, it was *held*, that the *prima facie* case of negligence made by the act of 1856, ch. 7, was not repelled. *Clark v. R. R.*, 109.

2. In an action by a passenger on a railroad against the company to recover damages for the loss of his trunk, the plaintiff is not a competent witness to prove the loss of his trunk, or its contents, though he offer to swear that he has no means of proving those facts or either of them except by his own oath. *Smith v. R. R.*, 202.

RAPE.

An infant under 14 years of age cannot commit the crime of rape; nor, if he be a colored person, can he commit the crime of an assault upon a white female with intent to commit rape upon her. *S. v. Sam*, 293.

RECOGNIZANCE.

1. A judge, being possessed of jurisdiction over the person of a prisoner by any proceeding before him, may adjudge that he be allowed bail, and make an order that his recognizance be taken by a justice or justices named by him, in a sum fixed by him; and a recognizance taken according to such order is valid. *S. v. Edney*, 463.

2. An instrument of writing, executed with an intention to comply with such an order, in the form of a bond, signed and sealed by the prisoner and his surety, on the prisoner's being let out of prison, and received by the justices named, by them returned to the proper court and by its order filed as a record, is a recognizance. *Ibid.*, 463.

RECOGNIZANCE—*Continued.*

3. Taking a recognizance consists merely in making and attesting a memorandum of the acknowledgment of a debt due to the State, and of the condition on which it is to be defeated. *Ibid.*, 463.

4. Presenting a petition to a judge for a writ of *habeas corpus* gives him jurisdiction of the subject, and the parties may waive all errors and dispense with all form, in the proceeding on it. *Ibid.*, 463.

5. Where a petition for a *habeas corpus* was presented to a judge in order that the petitioner might be admitted to bail, and the judge gave no formal judgment, but informally expressed his opinion in writing on the petition that the prisoner was entitled to bail, and signed his name *officially* to a sheet of paper, that a writ might issue if the parties desired it; and, by consent of the solicitor for the State, suggested that bail might be taken without any further proceedings on the petition, and fixed the amounts in which bail should be taken and named the justices of the peace to take it, and the prisoner was afterwards discharged from prison on his entering into a recognizance, together with the defendant as his surety, in the sum fixed by the judge, before the justices named by him, and the prisoner and defendant subscribed their names and affixed their seals to the recognizance, this is plenary proof of a waiver of all errors in the proceedings. *Ibid.*, 463.

6. It seems that the defendant would be estopped by the recital that "upon application to the judge, he had ordered that the prisoner be allowed bail in the sum of $2,000, and had authorized the two justices to take the recognizance," *Ibid.*, 463.

RECORD.

It is no valid objection to the record of an indictment and conviction thereon in a capital case that the record does not set out that the grand jury found the indictment to be a "true bill," nor that the witnesses upon whose testimony the indictment was found were sworn before they were sent to the grand jury. *S. v. Harwood*, 226.

REMAINDER.

A legatee for life or years is not bound to give a bond for the benefit of the remainderman, unless it is shown that there is danger of the property being wasted or eloigned. *Horah v. Horah*, 650.

RETAILERS OF SPIRITUOUS LIQUORS.

Although it seems that one who has been licensed to retail spirits cannot assign his license, he may lawfully employ an agent to conduct the business for him, although he leaves the county for an indefinite time, as for instance, in the military service of the Confederate States for three years or the war. *S v. McNeeley*, 232.

REVERSION. See Devise.

RULE IN SHELLEY'S CASE.

1. Where a father, by deed, gave to his daughter and the heirs of her body a tract of land, and provided that "if the said daughter should die and leave an heir or heirs of her body, in that case said heirs,

RULE IN SHELLEY'S CASE—*Continued.*

being her children or child, is to have, occupy, and possess all the property herein given, to them and their heirs forever," it was *held* that the children of the said daughter take as *purchasers*, and that the rule in *Shelley's case* does not apply. *Williams v. Beasley*, 102.

2. Whether the rule in *Shelley's case* would apply where the limitation is to A. for life, remainder to the heirs of her body and their heirs, *quære*. *Ibid.*, 102.

SALE OF SLAVES.

1. Where a parol agreement was made between A. and B. for the change of slaves, and A.'s slave went immediately into the possession of B., but the slave of the latter being a runaway at the time, it was agreed that A. should, at his own risk, take him into possession whenever he could do so, it was *held* that on A.'s afterwards taking possession of the slave, the title passed to him. And it was *held further*, that such a contract made with the attorney of B., under a *parol authority*, followed by delivery, was valid to pass the title. *Bailey v. Moore*, 86.

2. A., being the owner of a female slave, left the State, but before going away conveyed the house and lot in which the slave lived to the defendant, and gave him a note for $50 in consideration that he, the defendant, would support the slave and her husband (both being old) for their lives; it was *held* that this was a sale of the slave to the defendant. *S. v. Duckworth*, 240.

SELF-DEFENSE.

1. Where the defendant in a State's warrant, charging a misdemeanor, put himself in armed resistance to the officer having such warrant, and the officer, in an attempt to take defendant, slew him, without resorting to unnecessary violence, it was *held* that he was justified. *S. v. Garrett*, 144.

2. The principle of *self-defense* does not apply to the case of one who puts himself in the posture of armed defiance to the process of the State. *Ibid.*, 144.

3. One to whom a State's warrant is specially directed is bound to show it, and read it if required; but where the defendant in such warrant had notice of the process, and was fully aware of its contents, and had made up his mind beforehand to resist its execution, it was *held* that the officer did not become a trespasser *ab initio* by refusing to produce his warrant on demand. *Ibid.*, 144.

4. It is not the belief, simply, of a man that he is about to be stricken which will justify him in striking first, but his belief founded on reasonable grounds of apprehension. One who seeks a fight or provokes another to strike him cannot justify returning the blow on the ground of self-defense. *S. v. Bryson*, 476.

SHERIFF.

1. A sheriff who has received a note given by a *feme covert*, for collection, is not guilty of negligence in failing to take out a warrant on that claim (it being within a justice's jurisdiction), so as to subject him on his official bond. *Graham v. Buchanan*, 93.

SHERIFF—*Continued.*

2. Where the deputy of a sheriff received the bond of a married woman within a justice's jurisdiction for collection, and failed to collect the same during the sheriff's official term, but afterwards, when acting as the deputy of his successor, collected it and failed to pay over the money, it was *held* that there was no breach of the former sheriff's official bond. *Ibid.*, 93.

3. If the sheriff fails to take bail, the plaintiff need not file exceptions nor give notice to fix him as bail. *Adams v. Jones*, 198.

4. And the sheriff is said to fail to take bail when the paper returned by him as a bail bond is so defective and imperfect as to be adjudged not to be such. *Ibid.*, 198.

5. The provision of sec. 3, ch. 78, Revised Code, giving the whole amount of debt as damages for the failure of an officer to collect a claim put into his hands for collection, when the debtor is solvent, only applies to claims within the jurisdiction of justices of the peace, and does not apply in cases of noncollection of process issuing from court. *McLaurin v. Buchanan*, 91.

6. A court of equity will not entertain a bill by a purchaser of land at execution sale against the sheriff, to compel him to convey, because the court of law, from which the execution issued, can compel him to do so. *Patrick v. Carr*, 633.

SLAVES.

1. One who has made a gift of slaves void by the act of 1806 (Rev. Code, ch. 50, sec. 12) cannot be estopped to assert his right by any act *in pais*. Nor is he estopped by the record of a partition of the slaves by a suit, some of the parties to which, being infants and his wards, sue by him as their guardian. *Branch v. Goddin*, 493.

2. Buying of and receiving from a slave corn or other forbidden article on the slave's own account, the owner of the slave being present and knowing what is done, and giving no *written* permission, is indictable under sec. 85, ch. 34, Rev. Code. *S. v. Honeycutt*, 464.

3. It is not ground for arresting judgment that the two offenses, of permitting a slave to go at large as a free person and of permitting him to keep house as a free person, are joined in the same count of an indictment. *S. v. Brown*, 488.

4. If a slave, living in a house to himself, keeps a boarding-house for his own livelihood, and the master, knowing it, exercises no control over him or his business, this is an offense within ch. 107, sec. 29, Rev. Code. *Ibid.*, 488.

SOLDIER. See Conscription and Habeas Corpus.

TAXES.

1. Clause 19, section 86, schedule B, of the act of 1862, imposing a tax of all the net profits above 75 per cent on the cost of production, on every person or corporation manufacturing cotton or woolen cloth,

TAXES—*Continued.*

etc., is constitutional, though the calculation of the profits commences from a time prior to the passage of the act. *Murchison v. McNeill*, 217.

2. A court of equity will entertain a bill against a municipal corporation for the purpose of trying the legality of a tax imposed by the corporation. *Worth v. Commissioners*, 617.

3. The Legislature has the power to authorize a municipal corporation to levy a tax on the town property, the persons and subjects of taxation incident to the person, of those who have a business residence in towns, though their family residence is out of town. *Ibid.*, 617.

4. Whether courts of equity can interfere, by injunction, to restrain the collection of State and county taxes, *quære*. It *seems* they cannot. *Ibid.*, 617.

TRUST.

The performance of a trust, created by a conveyance of property to a trustee, for the use of insolvent persons, upon an inadequate consideration, or gratuitously, will be enforced against the trustee at the suit of the *cestui que trust*. *Baker v. Evans*, 652.

VENDOR AND PURCHASER.

1. Equity will annul a contract for the purchase of land by a man whose mental faculties are greatly impaired, at a price double its value, obtained from him when he was deprived of the counsel of his friends, by the fraudulent practice of the vendor. *Garrow v. Brown*, 595.

2. A. bought land from B., paid the price, and directed B. to convey to a trustee, for the sole and separate use of his (A.'s) wife and children. B. executed a deed with the intention of conveying the land accordingly, but from the ignorance of the draftsman the deed was inoperative. Afterwards A. conveyed the lands to secure the payment of a debt to C. By virtue of an execution against C., his interest in the land was sold, and B. bought from the sheriff, and took a deed from him for the price of $150. A. at the time of his purchase from B. was greatly indebted, and some of the debts were still due: it was *held*, that A. and his wife might maintain a suit in equity to compel B. to convey the land to the sole and separate use of the wife; and that B.'s deed from the sheriff was a security for the sum of $150 paid by him, and not for the amount of the debt due to C. *Haskill v. Freeman*, 585.

3. A court of equity will not entertain a bill by a purchaser of land at execution sale, against the sheriff, to compel him to convey because the court of law, from which the execution issued, can compel him to do so. *Patrick v. Carr*, 633.

4. The purchaser of an equity of redemption at sheriff's sale has a right to call for the legal estate upon discharging such part of the mortgage debt as remains unpaid. *Schoffner v. Fogleman*, 564.

5. In sales of land under execution there is a distinction between the cases in which the defendant has an interest subject to execution

VENDOR AND PURCHASER—*Continued.*

and the cases in which his interest is not so subject. In the first mentioned cases the purchoser becomes the owner of the defendant's interest, and if it be an equity, upon discharging the encumbrances on it he has a right to call for the legal estate. In the last mentioned cases the purchaser only succeeds to the equity of the debtor to the extent of holding it as a *security* for the money paid. *Ibid.*, 564.

6. The widow of a deceased vendee of land who has paid the purchase-money may, by a bill against the heirs of her late husband and the heirs of the vendor, compel a conveyance of the land by the heirs of the vendor to the heirs of the vendee and an assignment of dower to herself. *Smith v. Smith*, 581.

WAIVER.

1. Where an appeal stood on the docket of the Superior Court for three terms, and at the fourth the appellee moved to dismiss it for irregularity, it was *held* that all such objections were considered as waived by the delay and acquiescence. *Johnson v. Murchison*, 83.

2. Where a petition for a *habeas corpus* was presented to a judge, in order that the petitioner might be admitted to bail, and the judge gave no formal judgment, but informally expressed his opinion in writing on the petition that the prisoner was entitled to bail, and signed his name *officially* to a sheet of paper, that a writ might issue if the parties desired it; and, by the consent of the solicitor for the State, suggested that bail might be taken without any further proceedings on the petition, and fixed the amount in which bail should be taken, and named the justices of the peace to take it, and the prisoner was afterwards discharged from prison on his entering into the recognizance, together with the defendant as his surety, in the sum fixed by the judge, before the justices named by him, and the prisoner and defendant subscribed their names and affixed their seals to the recognizance: this is plenary proof of a waiver of all errors in the proceedings. *S. v. Edney*, 563.

WARRANT.

One to whom a State's warrant is specially directed is bound to show it, and read it if required; but where the defendant in such warrant had notice of the process, and was fully aware of the contents, and had made up his mind beforehand to resist its execution, it was *held* that the officer did not become a trespasser *ab initio* by refusing to produce his warrant on demand. *S. v. Garrett*, 144.

WIDOW.

1. Where real estate of inheritance is purchased by partners for partnership purposes, and is so used, the widow of one of the partners buying is entitled to dower in such real estates. *Patton v. Patton*, 572.

2. The widow of a deceased vendee of land who has paid the purchase-money may, by a bill against the heirs of her late husband and the heirs of the vendor, compel a conveyance of the lands by the heirs of the vendor to the heirs of the vendee, and an assignment of dower to herself. *Smith v. Smith*, 581.

WIDOW—*Continued.*

3. A widow's dissent from her husband's will, by which his estate was made a common fund for the support of herself and his children, until her death or marriage, when it was to be divided equally among his children, has the effect of making the personal property divisible among her and the children as if he had died intestate. *Wilson v. Stafford*, 646.

4. If property be given by will to the testator's widow for life, with remainder over, and the widow dissent from the will, the remainder immediately vests in possession. *Ibid.*, 646.

WILL.

1. Where the certificate of the probate of a will set forth that it was duly proved in common form by the oath of A., one of the subscribing witnesses, and then proceeded to state what the witness swore to, and there was no assertion among these particulars that A. subscribed the will as a witness in the presence of the testator, it was *held* that the probate was defective. *Leatherwood v. Boyd*, 123.

2. Had the certificate stated that the will was *duly* proved in common form by the oath of A., one of the subscribing witnesses thereto, without attempting to set forth what the witnesses swore to, it would have been deemed sufficient. *Ibid.*, 123.

3. Where a person, in his last sickness, desired his physician to write his will, which he declined to do, but told him that A. and B. were on the piazza, and that he might make his will by oral declarations in their presence, and A. and B. were called into the sick man's presence by his direction, and, addressing A. by name, he stated to him, in the presence of B. and the physician, how he wished his property to be divided, and named A. and another person as his executors, it was *held* that this was a sufficient *rogatio testium* to make a valid nuncupative will. *Haden v. Bradshaw*, 259.

4. A testator devised to his wife a tract of land for her life, and after disposing of several other articles of property and sums of money, added: "All my property that is *not named*, both real and personal, is to be sold, and after paying all my just debts, to be equally divided between my lawful heirs, in such a way as to make them all equal": it was *held*, that the reversion of the land devised to the wife for life fell into the residue, and must be sold for an equal division; and it was *held further*, that upon a covenant made by one of the heirs to pay to the executor such sum as might be necessary to make the shares of the other heirs equal with his, no action could be brought until such reversion was sold. *Cline v. Latimore*, 206.

5. A devise of a tract of land to the son of a testator, "if he be living, and return to the county of Orange," is a gift of the land on condition that the son returns to Orange as his domicil, and not as a mere transient visitor, especially when other provisions of the will seem to show the testator's expectation and desire that the son should reside there after the testator's decease. *Reeves v. Craig*, 209.

6. Whenever a testator has shown an intention to dispose of all his property, and uses words sufficient for that purpose, any estate to which he is entitled in reversion will pass. *Page v. Atkins*, 268.

WILL—*Continued.*

7. Where a testator devised a tract of land to his wife for life and after several bequests of money and specific legacies, added: "My desire is that all the property that I have not willed away shall be sold after my death, and equally divided between my six children," etc., it was *held* that the reversion in the land given to the widow for life passed by the residuary clause, and was to be sold and divided among the six legatees. *Ibid.*, 268.

8. A gift by will to A. for life, remainder to B. in fee, with a power to sell all or so much of the property as in her judgment may be necessary, vests in A. an estate for her life, with a power of sale appurtenant to her life estate. *Troy v. Troy*, 624.

9. And the expression by the testator, in a subsequent part of his will, of a doubt whether the power of sale would not make A. the absolute owner of the whole estate, and a direction that in case such should be the construction in law, that C. should have the legal estate in fee in the property in trust, etc., do not convey to C. any estate or interest in the property. *Ibid.*, 624.

10. The will declares the expense of the education of his son to be a charge on all his property. A. holds the proceeds of sales, made under the power, in trust to pay debts, for her own support, and for the support and education of B. *Ibid.*, 624.

11. A testator, in 1819, bequeathed to his daughter a negro woman in the following words: "to her and the heirs of her own body forever, and if none, to return after her death to the rest of my children equally." The limitation over to the testator's other children is not too remote. *Blake v. Page*, 252.

12. A testator devised land and bequeathed personal estate to sundry persons. By a residuary clause he gives all the rest of his estate, real and personal, to his executors, in trust to sell and divide the proceeds among his wife and children. Then follows immediately this clause: "I direct my executors to keep my estate together, and not to *hand over* any of the devises or legacies until my existing railroad contracts in T. and N. C. are completed." The last clause has relation only to what is given in the residuary clause. *Patton v. Patton*, 572.

13. Testator by one clause in his will gives to his wife all his property of every species whatever, during her life. Another clause says that any children born during his marriage with his said wife shall be coequal heirs with her. The testator dies without having had any children born during his marriage. *Held*, the wife takes an absolute estate in all his property. *Turner v. Kittrell*, 589.

14. A testator gives to his wife real and personal property for life, and directs that at her death it should all, real and personal, be sold, and the money equally divided among his children; it was *held*, that by the direction to sell, the land is converted into personalty. *Ibid.*, 589.

15. A bequest in these words (after a bequest to A., a daughter of Mary Pickett), "I give and bequeath to all the rest of my nieces, Mary Pickett's children, that she now has or may hereafter have, Maria and Jim to share equally, the above negroes to remain in the hands,

WILL—*Continued.*

etc." Mary Pickett was a niece of the testatrix, and had, when the will was made, no other daughter than A., but had two sons, and it was *held* that the bequest was to all the *children* of Mary Pickett, which she then had, except A., or might at any time thereafter have, whether in the lifetime of the testatrix or after her death. *Pickett v. Southerland*, 615.

16. Testator bequeaths slaves to A., B., and C. He directs A., B., and C. to purchase a tract of land, on which the slaves are to live, and to cultivate it. The executors are directed to pay to A., etc., $500 for the purpose of stocking the land. This is a *quasi* emancipation, and is void, independently of the act of 1860, ch. 37. *Miller v. London*, 628.

17. Testator gives to his wife all his slaves except those bequeathed as above stated, and concludes his provision for her by giving her all his "property and estate of every kind and description" which is not hereinbefore or hereinafter excepted or disposed of." This is a special residue, and the slaves intended to be given to A., etc., and the legacies intended for their benefit, belong to the next of kin of the testator (his widow having died), after payment of his debts, for the payment of which they constitute the primary fund. *Ibid.*, 628.

18. A bequest to grandchildren or children and grandchildren *eo nomine*, with a direction for equal division among them, is a gift to them *per capita*. *Lane v. Lane*, 630.

19. The general rule is that property given to legatees who die in the lifetime of the testator falls into the residue. *Coley v. Ballance*, 634.

20. If property be given to A. until B., an infant, arrives at the age of 21, and then to B., and B. dies under the age of 21, in the lifetime of the testator, A. has an estate in it until B. would have been 21 if he had lived. *Ibid.*, 634.

21. If property be given to two as joint tenants, and one die in the lifetime of the testator, by the operation of our act abolishing survivorship his share falls into the residue. *Ibid.*, 634.

22. A bequest of "all my farming utensils of every description that are not otherwise disposed of" is a gift to the legatee of a wagon used on the farm, and of blacksmith's tools used in doing the work necessary for the farm, and occasionally in doing work for the neighbors, there being in the will no other gift of them specifically, and the will containing no residuary clause nor any other clause which could pass them. *Platt v. Moody*, 636.

23. A bequest of "all my present stock of hogs, or that I may have at the time of my death, together with their increase," passes the testator's interest in hogs in his possession at the time of his death, which belonged to the estate of his son, dead intestate and without issue, there being no administration on the son's estate. *Ibid.*, 634.

24. A widow's dissent from her husband's will by which his estate was made a common fund for the support of herself and his children,

WILL—*Continued.*

until her death or marriage, when it was to be divided equally among his children, has the effect of making the personal property divisible among her and the children as if he had died intestate. *Wilson v. Stafford*, 646.

25. The administrator of a child who has died since the testator is entitled to the share of the deceased child. *Ibid.*, 646.

26. If property be given by will to the testator's widow for life, with remainder over, and the widow dissent from the will, the remainder immediately vests in possession. *Ibid.*, 646.

27. These words in a will, "I give to my daughter, Susannah, four slaves, named, etc., to her and her heirs: *Provided, nevertheless*, if the said Susannah die childless, then it is my desire that my son Aaron remove back to this country, and to have them, but not to take them to any other part of this country," do not impose a *condition* that Aaron shall return to this country. *Harris v. Hearne*, 481.

28. A devise "to A. R. for him and his mother and the rest of the family to live on until the youngest becomes of age," is a gift of the estate in fee simple to A. R. *Riley v. Buchanan*, 479.

29. A testator gave to his wife real and personal property for life, and directed that at her death it should all, real and personal, be sold and the money be equally divided among his children: it was *held* that, by the direction to sell, the land was converted into money; and that as such the husband of one of the testator's daughters, who had survived her father, but died in the lifetime of her mother, was, as the administrator of his wife, entitled to her share. *Conly v. Kincaid*, 594.

30. A testator gave to his wife all his slaves except two, bequeathed in the last section, and concluded his provision for her by giving her all his property and estate of every kind and description "which is not hereinbefore or hereinafter excepted or disposed of"; and it was *held*, that this was a special residue, and the slaves intended to be given to A., B., and C., and the legacies intended for their benefit, were undisposed of and went to the next of kin, and constituted the primary fund for the payment of the testator's debts. *Ibid.*, 625.

WITNESS. See Evidence.

WRIT OF ERROR.

1. Where the object of a writ of *habeas corpus* is to inquire whether there is probable cause for the commitment of the person charged with the crime, the decision on it is not the subject of review by *writ of error* or *certiorari*. *Walton v. Gatlin*, 310.

2. Where the question in a writ of *habeas corpus* is concerning the power of the committing magistrate or the court, or the legality of the commitment, the weight of authority is in favor of the doctrine that the decision is the subject of review. *Ibid.*, 310.

WRIT OF ERROR—*Continued.*

3. The decision on a writ of *habeas corpus* to free a person from restraint for any other cause than the commission of a criminal offense is a *judgment*, and is the subject of review by *writ of error* or *certiorari*. *Ibid.*, 310.

YEAR'S ALLOWANCE.

An administrator has a right to appeal from an order of the county court affirming the year's allowance made to a widow. *Saunders v. Russell*, 97.